Supreme Court, U.S.
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FEB 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1430

KURT R. STRAUBE, M.D.,

Petitioner,

v.

EMANUEL LUTHERAN CHARITY BOARD,
a corporation, dba EMANUEL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT

See Inside Cover for Counsel

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision Involved	3
Statement of Case	3
Argument	10
Conclusion	27
Appendices:	
Opinions and Orders of the Oregon Supreme Court	A-1
Opinions and Orders of Multnomah County Circuit Court	B-1
Opinion of United States District Court for the District of Oregon	C-1
Opinion of Court of Appeals for the Ninth Circuit	D-1

INDEX OF AUTHORITIES

Cases Cited

Page

Adler v. Montefiore Hospital Ass'n of W. Pa., 453 Pa 60, 311 A2d 634 (1973), cert denied 414 US 1131, 94 S Ct 870, 38 L Ed 2d 755 (1974) 13

Ascherman v. Presbyterian Hosp. of Pack. Med. C., Inc., 507 F2d 1103 (9th Cir 1974) 11

Board of Regents v. Roth, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972) 24

Briscoe v. Bock, 540 F2d 392 (8th Cir 1976) 11

Burton v. Wilmington Parking Authority, 365 US 715, 81 S Ct 856, 6 L Ed 2d 45 (1961) 18

Christhilf v. Anapolis Emergency Hospital Ass'n, Inc., 496 F2d 174 (4th Cir 1974) . 10

Citta v. Delaware Valley Hospital, 313 F Supp 301 (ED Pa 1970) 11

City of McPherson v. Nichols, 48 Kan 430, 29 P 679 (1892) 19

Cumnock v. City of Little Rock, 154 Ark 471, 243 SW 57 (1922) 19

Dixon v. Love, 431 US 105, 97 S Ct 1723, 52 L Ed 2d 172 (1977) 25

Doe v. Bellin Memorial Hospital, 479 F2d 756 (7th Cir 1973) 11

Cases Cited

Page

Doyle v. Unicare Health Serv., Inc., Aurora Center, 399 F Supp 69 (ND Ill 1975), aff'd 541 F2d 283 (7th Cir 1976) . 11, 12

Duby v. Brown, 369 Mass 614, 341 NE2d 870 (1976) 13

Flagg Bros., Inc. v. Brooks, 436 US 149, 98 S Ct 1729, 56 L Ed 2d 185 (1978) . . . 20

Goldberg v. Kelly, 397 US 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970) 24

Goss v. Lopez, 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975) 24

Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975) 13

Greco v. Orange Memorial Hospital Corporation, 513 F2d 873 (5th Cir 1975), cert denied 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975) 11

Hirschkop v. Snead, 594 F2d 356, 370-71 (4th Cir 1979) 27

Hobbins v. Methodist Hosp. of Madison, 420 F Supp 773 (WD Wisc 1976) 12

Indiana ex rel Anderson v. Brand, 303 US 95, 58 S Ct 443, 82 L Ed 685 (1938) . . . 16

Jackson v. Metropolitan Edison Company, 419, US 345, 95 S Ct at 449, 42 L Ed 2d 477 (1974) 22

Cases Cited

Page

Jackson v. Metropolitan Edison Company, 95 S Ct at 464 22

Jackson v. Norton Children's Hospitals, Inc., 487 F2d 502 (6th Cir 1973) 11

Johnson v. Southwest Detroit Community Mental, Etc., 462 F Supp 166 (ED Mich 1978) 11

Large v. Reynolds, 414 F Supp 45 (WD Va 1976) 11

Moose Lodge No. 107 v. Irvis, 407 US 163, 92 S Ct 1965, 32 L Ed 2d 627 (1972) . . . 20

Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F Supp 1020 (SD NY 1971) . . 12

O'Neil v. Grayson County War Memorial Hospital, 472 F2d 1140 (6th Cir 1973) . . 10

Orr v. Orr, ____ US ____, 99 S Ct 1102, 1110, ____ L Ed 2d ____ (1979) 16

Papachristou v. City of Jacksonville, 405 US 156, 92 S Ct 839, 31 L Ed 2d 110 (1971) 27

Perry v. Sinderman, 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972) 24

Poe v. Charlotte Memorial Hospital, Inc., 374 F Supp 1302 (WD NC 197[illegible] 11

Sams v. Ohio Valley General Hospital Ass'n, Inc., 413 F2d 826 (4th Cir 1969) . 10, 11

Cases Cited

Page

Schlein v. Milford Hospital, 383 F Supp 1263 (D Conn 1974), 423 F Supp 541 (D Conn 1976), aff'd 561 F2d 427 (2nd Cir 1977) 12

Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969) 24, 25

Straube v. Emanuel Lutheran Charity Board, 287 Or 375, 600 P2d 381 (1979) . . 15

Straube v. Larson, et al., No. 74-3496, 74-3497 (9th Cir 1976) 15

Suckel v. Madison General Hospital, 362 F Supp 1196 (WD Wisc 1973), aff'd 499 F2d 1364 (7th Cir 1974) 12

Ward v. St. Anthony Hospital, 476 F2d 671 (10th Cir 1973) 11

Statutes and Constitutional Provision

U.S. Const., Amendment XIV 3

28 USC § 1257(3) (1976) 1

42 USCA §§ 1983 and 1985(3) 4, 5

42 USC § 2689 et seq. (1976) 17, 18

Treatises

	Page
2 McQuillin Municipal Corporations § 4.99 (1979)	19
25 ALR 612 (1923)	19

This is a petition for certiorari to review the judgment of the Oregon Supreme Court in the case of Straube v. Emanuel Lutheran Charity Board, Oregon Supreme Court No. 25276.

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 287 Or 375, 600 P2d 381 (1979). See Appendix A. The opinion of the Multnomah County Circuit Court is not reported. See Appendix B.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion sought to be reviewed was filed and entered by the Oregon Supreme Court on September 18, 1979. A timely petition for rehearing was filed, and the petition was denied on November 20, 1979. Judgment was entered on December 18, 1979. See Appendix A.

Jurisdiction is conferred upon this court by 28 USC § 1257(3) (1976).

QUESTIONS PRESENTED FOR REVIEW

1. Is a private, non-profit hospital that receives federal funding, enjoys federal tax exemptions, and provides vital services to the general public required to comply with the due process dictates of the federal constitution when the hospital suspends the medical staff privileges of a hospital based physician (radiologist)?

2. Assuming that the hospital in this case was required to comply with federal constitutional due process dictates, did it do so when:

(a) it provided no opportunity for the petitioner to be heard prior to a summary suspension order;

(b) the persons who affirmed the summary order at the post-suspension hearing were acquainted with the matter prior to the hearing and biased against petitioner; and

(c) the hospital bylaw under which petitioner was suspended required conduct contary to "the best interest of patients' care?"

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution, which provides in part:

> "**** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 1 USC LII (1976).

STATEMENT OF THE CASE

Petitioner is a duly licensed physician and was a member of the medical staff of Emanuel Hospital, a private, non-profit charitable organization located in Portland, Oregon. On or about January 30, 1973, petitioner was summarily suspended from

the medical staff without being advised prior to the suspension that such suspension was being considered and without being allowed any opportunity to inquire into the basis of the suspension. Following the suspension, petitioner was afforded a hearing before the hospital Executive Committee. Subsequent hearings were held on the suspension, and on or about January 24, 1974, the summary suspension was made permanent.

Certain members of the Executive Committee met and discussed the charges against petitioner prior to the formal Executive Committee hearing. Petitioner was suspended pursuant to a provision of the hospital bylaws which allowed termination of staff privileges if an individual does not act "in the best interests of patient care."

Petitioner then filed two actions in the United States District Court for the District of Oregon claiming violations of 42

USCA §§ 1983 and 1985(3). These actions were dismissed for failure to state a claim upon which relief could be granted. See Appendix C. The lower court decision was affirmed by the United States Court of Appeals for the Ninth Circuit. See Appendix D. This court denied certiorari. 429 US 830, 97 S Ct 91, 50 L Ed 2d 94 (1976).

Petitioner also brought this suit in the Circuit Court of the State of Oregon for the County of Multnomah. Petitioner sought an order restoring his staff privileges and enjoining the defendant from proceeding against him in the future unless it did so in compliance with due process and with its bylaws. Petitioner also sought compensatory and punitive damages, attorney fees, and costs.

In his complaint, petitioner alleged that defendant was a non-profit corporation existing for charitable purposes under

Chapter 61 of the Oregon Revised Statutes, had received public support in the form of tax exemptions, subsidies, federal funds under the Hill-Burton Act, and charitable contributions from the general public. The Multnomah County Circuit Court dismissed petitioner's due process claims on defendant's motion for summary judgment.

Petitioner appealed to the Oregon Supreme Court, which affirmed the order of the Circuit Court. A brief amicus curiae was filed in support of petitioner's position by the American Medical Association.

The federal constitutional question on which petitioner seeks review in this court was raised in the Multnomah County Circuit Court in petitioner's complaint, which appears at page 1 of the Trial Court File. The pertinent allegations also appear in the amended complaint (Trial Court File, page 71), second amended complaint (Trial Court File, page 118) and third amended complaint (Trial

Court File, page 164). Those allegations state:

"VII

"The summary suspension and permanent suspension, and each of them, of plaintiff's staff privileges were wrongful in one or more of the following particulars:

"(a) That at no time herein mentioned was plaintiff provided nor did the by-laws, rules or regulations governing the operation of Emanuel contain provision for doing any of the following things, or their equivalent: (1) for advising a physician, prior to his suspension, that his suspension was being considered, (2) for advising such physician of the charges, if any, against him prior to the exercise of summary suspension, (3) for a reasonable investigation of the charges or other alleged facts which are to form the basis of a summary suspension, or (4) for giving such physician an opportunity to be heard prior to the issuance of the summary suspension order.

"(b) That at no time herein mentioned with respect to proceedings as to whether the summary suspension should be continued, was plaintiff provided nor did the by-laws, rules, or regulation governing the operation of said

hospital contain provision for (1) a method to show bias and prejudice of witnesses, (2) a concise statement of the charges, (3) an impartial Executive Committee, Review Committee, Board of Directors and Joint Conference Committee to determine plaintiff's right to staff privileges, (4) an Executive Committee, a Review Committee, a Board of Directors or a Joint Conference Committee which refrained from considering evidence outside of the record, (5) an Executive Committee, a Review Committee, a Board of Directors or a Joint Conference Committee which followed the by-laws and regulations of defendant Emanuel, and (6) by-laws and regulations for summary suspensions and continuance thereof which were not unconstitutionally vague and overbroad, ***

"VIII

"That at no time material herein was it established under the by-laws that plaintiff's staff privileges should be suspended. The summary suspension, its continuance, and the permanent suspension of plaintiff's staff privileges, were unjustified under the by-laws, were arbitrary, capricious, discriminatory, and without any basis in fact or law and in direct violation of the due process and equal protection clauses of the United States Constitution and the Oregon Constitution."

The federal constitutional question was passed upon by the Circuit Court when it allowed defendant's motion for partial summary judgment. The motion for partial summary judgment appears at page 268 of the Trial Court File and the memorandum in support appears at page 270. The petitioner's memorandum in opposition appears at page 302. The order on the motion for summary judgment appears at page 297 and the relevant opinion letters by the Trial Court appear at page 295. The order and opinion letters are set forth in Appendix B.

Petitioner raised the federal constitutional question in the Oregon Supreme Court in its first assignment of error which reads:

> "The trial court erred in granting partial summary judgment holding that the defendant was not required to afford plaintiff with due process of law in connection with the summary suspension and

> permanent suspension of his staff privileges." Appellant's brief at page 37.

Petitioner's federal constitutional claim was rejected by the Oregon Supreme Court, 287 Or at 383, 600 P2d at 386, and the judgment of the Circuit Court was affirmed.

ARGUMENT

1. Review is warranted in this case because it involves a question on which the lower federal courts are divided.

A number of lower federal courts have considered the question of whether or not a private hospital is subject to the due process requirements of the Fourteenth Amendment to the United States Constitution, and the results have been inconsistent. Compare Christhilf v. Anapolis Emergency Hospital Ass'n, Inc., 496 F2d 174 (4th Cir 1974); O'Neil v. Grayson County War Memorial Hospital, 472 F2d 1140 (6th Cir 1973); Sams v. Ohio

Valley General Hospital Ass'n, Inc., 413 F2d 826 (4th Cir 1969); Large v. Reynolds, 414 F Supp 45 (WD Va 1976); Poe v. Charlotte Memorial Hospital, Inc., 374 F Supp 1302 (WD NC 1974); Citta v. Delaware Valley Hospital, 313 F Supp 301 (ED Pa 1970) (all holding that private non-profit hospitals must comply with Fourteenth Amendment requirements) with Briscoe v. Bock, 540 F2d 392 (8th Cir 1976); Greco v. Orange Memorial Hospital Corporation, 513 F2d 873 (5th Cir 1975), cert denied 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975); Ascherman v. Presbyterian Hosp. of Pack. Med. C., Inc., 507 F2d 1103 (9th Cir 1974); Doe v. Bellin Memorial Hospital, 479 F2d 756 (7th Cir 1973); Ward v. St. Anthony Hospital, 476 F2d 671 (10th Cir 1973); Jackson v. Norton Children's Hospitals, Inc., 487 F2d 502 (6th Cir 1973); Johnson v. Southwest Detroit Community Mental, Etc., 462 F Supp 166 (ED Mich 1978); Doyle v. Unicare Health Serv.,

Inc., Aurora Center, 399 F Supp 69 (ND Ill 1975), aff'd 541 F2d 283 (7th Cir 1976); and Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F Supp 1020 (SD NY 1971) (all holding contra). Compare also the District Court opinions and the opinion of the Court of Appeals for the Second Circuit in Schlein v. Milford Hospital, 383 F Supp 1263 (D Conn 1974) (on motion to dismiss), 423 F Supp 541 (D Conn 1976) (on motion for summary judgment), aff'd 561 F2d 427 (2d Cir 1977).

The District Court for the Western District of Wisconsin has reached opposite results. Suckel v. Madison General Hospital, 362 F Supp 1196 (WD Wisc 1973), aff'd 499 F2d 1364 (7th Cir 1974) (holding that a private hospital was subject to due process requirements); Hobbins v. Methodist Hosp. of Madison, 420 F Supp 773 (WD Wisc 1976) (holding that the hospital was not subject to due process requirements). Moreover, at least two state

courts have noted the confusion in this area. Duby v. Brown, 369 Mass 614, 341 NE2d 870 (1976); Adler v. Montefiore Hospital Ass'n of W. Pa., 453 Pa 60, 311 A2d 634 (1973), cert denied 414 US 1131, 94 S Ct 870, 38 L Ed 2d 755 (1974).

Petitioner recognizes that this court previously has denied certiorari in a case involving the issue presented by the present case. Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975). Mr. Justice White, joined by the Chief Justice, filed a well reasoned dissent to that denial of certiorari, and his analysis merits reconsideration by the court in the present case:

> "Whether or not the Court agrees with the result reached below, the conflicts [among the lower courts] are square; they are on issues which arise with frequency in the lower federal courts; and they are on significant questions of law. Perhaps, in light of the current pressures on our docket,

> there may be a category of conflicts, involving insignificant points of federal law, which we simply do not have the capacity to resolve. However, it would undoubtedly surprise members of the bar and the public that this Court views the conflicts created by the decision below to fall within such a category." 98 S Ct at 436.

In the four years since the petition in Greco was denied, additional courts have had opportunities to consider the question presented by this case, but the law remains inconsistent. Petitioner submits that this is an appropriate case by which this court may resolve that inconsistency.

2. Review is warranted in this case because the Oregon Supreme Court decided a federal question of substance not previously determined by this court, and decided it in a way not in accord with this court's decisions.

This court has never considered whether a private, non-profit hospital must

comply with federal due process requirements in terminating a physician's staff privileges. This case presents the court with an opportunity to further clarify the "state action doctrine" in the context of a new factual situation. The decision below, moreover, should be reversed because it reaches a conclusion inconsistent with the reasoning behind this court's prior decisions.[1]

---

1. Defendant contended in state court that petitioner was "collaterally estopped" to raise the question of state action in this case because of a prior judgment in Straube v. Larson, et al., No. 74-3496, 74-3497 (9th Cir 1976). Brief for Respondent at 8, Straube v. Emanuel Lutheran Charity Board, 287 Or 375, 600 P2d 381 (1979). A similar contention was made at the trial level, where defendant contended that petitioner was "estopped from further litigating" the state action issue.

The Oregon Supreme Court, however, did not decide this case below upon res judicata grounds, but squarely faced and decided the federal constitutional question. 287 Or at 383, 600 P2d at 386. As this court held only last term:

> "Where the state court does not decide against a petitioner or appellant upon an independent state

(a) The Oregon Supreme Court erred in holding that the defendant hospital need not comply with federal due process requirements.

The Oregon Supreme Court disposed of plaintiff's federal constitutional claim in one paragraph, reasoning as follows:

> ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground." Orr v. Orr, ____ US ____, 99 S Ct 1102, 1110, ___ L Ed 2d ___ (1979) quoting Indiana ex rel Anderson v. Brand, 303 US 95, 58 S Ct 443, 82 L Ed 685 (1938).

Whether or not the prior judgment in the federal litigation precluded the present litigation is a question of state law that the courts below did not decide. Because the state courts decided the federal constitutional question, and decided it adversely to the federal right asserted, this court should allow review.

> "Plaintiff claims that the hospital is sufficiently involved with the state to owe him 'due process of law' under the Fourteenth Amendment of the United States Constitution. He argues that 'state action' is involved here because of 'federal funding, charitable solicitation from the general public, federal tax exempt status, and vital service to the general public.' However, he cites no authority that this is sufficient to constitute state action for the purpose of constitutional due process. In Jackson v. Metropolitan Edison Co., 419 US 345, 95 S Ct 449, 42 L Ed2d 477 (1974), the Court held that the action of a public utility in terminating service to a customer was not state action despite its regulation and its performance of an essential public service in which it possessed at least a partial monopoly. The action was not taken in the exercise of a power 'which is traditionally associated with sovereignity.' The performance of hospital services is not usually so associated." 287 Or at 383, 600 P2d at 386.

Petitioner submits that a correct reading of this court's prior decisions requires a determination opposite that reached by the court below.

This court's decisions recognize two distinct lines of "state action." First, state action may occur when the government itself has "insinuated itself into a position of interdependence" with a private actor so that it becomes "a joint participant in the challenged activity." Burton v. Wilmington Parking Authority, 365 US 715, 81 S Ct 856, 6 L Ed 2d 45 (1961). Secondly, state action may occur when a private individual or institution exercises "powers traditionally and exclusively reserved to the State." Jackson v. Metropolitan Edison Company, 419 US 345, 95 S Ct 449, 42 L Ed 2d 477 (1974). Both lines of state action can be found in the present case.

Both the state and federal governments have insinuated themselves into positions of interdependence with the defendant Emanuel Lutheran Hospital. Defendant enjoys federal tax exempt status and receives federal funding pursuant to the Hill-Burton Act, 42

USC § 2689 et seq. (1976). The State of Oregon, through its agency, the Health Division of the Department of Human Resources, licenses the defendant to provide health care services. ORS 441.015; 431.325.

The defendant in this case also performs a function traditionally performed by government. Provision of health care services has long been a function of state and local government. See 2 McQuillin, Municipal Corporations § 4.99 (1979). At common law, courts held that municipalities could construct and operate hospitals even without express statutory authorization, the theory being that such a function comes within the so-called "general welfare power." Cumnock v. City of Little Rock, 154 Ark 471, 243 SW 57 (1922); City of McPherson v. Nichols, 48 Kan 430, 29 P 679 (1892). See generally, 25 ALR 612 (1923).

Petitioner recognizes that under this court's prior decisions, the factors listed above would not, standing alone, be sufficient to subject defendant to the requirements of the federal constitution. Specifically, petitioner recognizes that although the state and federal governments are heavily involved in the funding and regulation of defendant, they are not involved in the specific activity about which petitioner complains, as seems to be required by Moose Lodge No. 107 v. Irvis, 407 US 163, 92 S Ct 1965, 32 L Ed 2d 627 (1972). Petitioner also recognizes that while provision of health care services is a function traditionally performed by the government, it is not an "exclusively" governmental function, as seems to be required by Flagg Bros., Inc. v. Brooks, 436 US 149, 98 S Ct 1729, 56 L Ed 2d 185 (1978). Nevertheless, petitioner submits that under the facts of this case, state action was

present when defendant terminated plaintiff's staff privileges.

The essential distinction between the present case and other decisions by this court dealing with the state action requirement is that this case does not truly involve a "private" entity at all. In addition to performing a government function, receiving government assistance, and being subject to government licensing requirements, this defendant operates under a charitable, non-profit charter. As such, neither defendant nor society in general have the same interest in freeing defendant from the limitations of the federal constitution as might exist in the case of a truly private entity.

Private parties can make a persuasive claim to be free of federal constitutional restrictions applicable to government entities "because of the value of providing a private sector in which the opportunity for

individual choice is maximized." Jackson v. Metropolitan Edison Company, 95 S Ct at 464 (Mr. Justice Marshall, dissenting). A truly private entity makes choices on the basis of self interest, and under our socio-economic system, it is assumed that such choices will ultimately inure to the benefit of society as a whole. A non-profit, charitable corporation such as defendant, on the other hand, does not make choices on a self-interest basis, but rather makes choices on the basis of what will best serve the public, the same basis on which government makes choices. As such, the reasons for limiting the reach of the constitution over private entities disappear where non-profit entities such as defendant are concerned.[2]

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2. The opinion in Moose Lodge No. 107 v. Irvis, 407 US 163, 92 S Ct 1965, 32 L Ed 2d 627 (1972) does not indicate whether the alleged state actor was a non-profit corporation, but even if it were, the present case would be distinguishable because Moose Lodge did not perform a government function. On the contrary, Moose Lodge was found to be "a private club within the ordinary meaning of that term." 92 S Ct at 1070.

This court's prior decisions require that government encourage private activity or that private activity be exclusively governmental in nature as a prerequisite to finding state action. These decisions should not be extended to apply to non-profit, charitable corporations such as the defendant in the present case. This court should recognize the distinction between this case and its earlier cases and reverse the judgment of the Oregon Supreme Court.

(b) Had the Oregon Supreme Court correctly decided the state action question, it would have been required to hold that the defendant hospital did not comply with federal due process requirements.

Defendant concedes, as it must, that petitioner has a property interest in his continued medical staff privileges with defendant. See Board of Regents v. Roth, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972); Perry v. Sinderman, 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972). Accordingly, if defendant exercised state action in terminating that relationship, defendant was required to afford petitioner procedural due process. The record demonstrates that it did not do so. Instead, defendant merely afforded petitioner a "kangaroo court" form of hearing.

First, defendant did not afford petitioner any hearing whatsoever prior to suspension of his staff privileges. This court's decisions clearly require that some kind of hearing must be provided prior to termination of benefits except in unusual cases. Goss v. Lopez, 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975); Goldberg v.

Kelly, 397 US 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970); Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969). See especially, Perry v. Sinderman, supra (existence of post-termination hearing held insufficient to justify termination of public employment without prior hearing). There were no facts in this case justifying petitioner's summary suspension. The trial court found as much when it concluded: "[I]t is difficult to understand why [petitioner's] privileges could not have been continued *** until the Executive Committee court had considered the matter." Trial Court Findings of Fact, Conclusions of Law and Decree, Exhibit C, page 13, Trial Court File pages 477 et seq. (June 3, 1977). Clearly, this is not a case like Dixon v. Love, 431 US 105, 97 S Ct 1723, 52 L Ed 2d 172 (1977), where the state had a strong interest in the summary revocation of

an individual's driver's license as a means of ensuring highway safety.

Even if a pre-termination hearing were not required in this case, petitioner would still have a valid due process claim because the post-termination hearing was constitutionally defective. This court has held that an impartial decisionmaker is essential if an administrative hearing is to comply with the requirements of due process. Goldberg v. Kelly, supra, 90 S Ct at 1022. The members of the Executive Committee, which conducted the post-termination hearing, were far from impartial, as the record in this case amply demonstrates. See page 3, supra.

Finally, the regulation under which petitioner was suspended did not comply with due process requirements because it was unconstitutionally vague. The regulation permitted defendant to terminate an employee upon a showing that the employee did not act

"in the best interest of patient care." This regulation is so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Papachristou v. City of Jacksonville, 405 US 156, 92 S Ct 839, 31 L Ed 2d 110 (1971). Contrary to the suggestion of the court below, the fact that this is not a criminal case does not mean the void for vagueness doctrine is inapplicable. See Hirschkop v. Snead, 594 F2d 356, 370-71 (4th Cir 1979) (state bar disciplinary rule). The text of the Fourteenth Amendment does not distinguish between civil and criminal proceedings.

CONCLUSION

The importance of the questions presented in this case merits full briefing. The petition for certiorari should be allowed.

Respectfully submitted,

Preston C. Hiefield, Jr.

Richard E. Alexander

E. Walter Van Valkenburg
Of Attorneys for Petitioner

A-1

COPY

November 21, 1979

01

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Re: Straube vs. Emanuel Lutheran Charity Board
SC 25276

Dear Counsel:

The Supreme Court on November 20, 1979, denied Appellant's Petition for Rehearing in the above-entitled matter.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

mh/vr
cc: William L. Hallmark

RHDN

Appendix A

STATE OF OREGON

SUPREME COURT

80 DEC 24 PM 1

CIVIL

137

KURT R. STRAUBE, M.D.,

Appellant,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondent.

JUDGMENT and MANDATE

Appeal from MULTNOMAH County Circuit Court

No. 402 226

SC 25276

IT IS HEREBY ADJUDGED and ORDERED that the respondent's motion to dismiss the appeal filed June 3, 1977, from the order of May 13, 1977, is allowed.

This cause having come on to be heard on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court taxed at $302.06.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered September 18, 1979.

ISSUED at Salem, Oregon: DEC 18 1979

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this DEC 18 1979.

LOREN D. HICKS
State Court Administrator

by _____
Deputy Administrator

1/3/80 XB

No. 149—September 18, 1979

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

STRAUBE,
Appellant,
v.
EMANUEL LUTHERAN CHARITY BOARD,
Respondent.

(No. 402-226 SC 25276)

Appeal from Circuit Court, Multnomah County.

Clifford B. Olsen, Judge.

Argued and submitted February 6, 1979.

Richard E. Alexander, of Davies, Biggs, Strayer, Stoel & Boley, Portland, argued the cause for appellant. With him on the briefs was Preston C. Hiefield, Jr., of Williams, Stark, Hiefield, Norville & Griffin, P. C., Portland.

William L. Hallmark, Portland, argued the cause and filed a brief for respondent. With him on the brief were William A. Masters, and Jones, Lang, Klein, Wolf & Smith, Portland.

William P. Isele, Chicago, Illinois, filed a brief amicus curiae for the American Medical Association.

HOLMAN, J.

Affirmed.

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*TONGUE, J., did not participate in the decision of this case.

*BRYSON, J., retired April 1, 1979.

HOLMAN, J.

Plaintiff, a radiologist, brought this suit against defendant hospital for wrongful suspension of his staff privileges. He sought an order restoring them and enjoining the hospital from proceeding against him in the future unless it did so in compliance with due process and with its bylaws. Plaintiff also sought compensatory and punitive damages, attorney fees, and costs. Defendant moved for summary judgment which was partially granted on the due process issues. After trial on the remaining issues, the court concluded that defendant had complied with its bylaws and that there was a basis in fact for defendant's temporary and permanent suspensions of plaintiff's staff privileges. Plaintiff appealed from both the granting of the partial summary judgment and the final decree.[1]

It is not disputed that plaintiff is an excellent radiologist. Defendant suspended him for his inability to work with others at the hospital, an inability that assertedly interfered with adequate patient care. Plaintiff started working as a radiologist in 1963 at the Lloyd Center X-ray, a partnership that had an exclusive agreement with defendant to provide its radiology services. Plaintiff was temporarily suspended by the president of defendant. Pursuant to defendant's bylaws, plaintiff requested and got a hearing before the Medical Staff Executive Committee (executive committee) of defendant. The executive committee found that plaintiff was, in fact, a disruptive influence, and continued his suspension until a later date, when the executive committee would hear further evidence to see whether plaintiff had resolved his problems in his relationship with others; if so,

[1] Plaintiff also instituted an action against four individuals, claiming they tortiously interferred with his business relationship with defendant hospital. He also lost that case at the trial level and appealed. The appeal in that case was argued at the same time as the appeal in this case. *See Straube v. Larson*, ___ Or ___, ___ P2d ___ (1979), decided this day.

defendant would restore plaintiff's privileges on a probationary basis.

Plaintiff appealed this decision to the Review Committee (review committee) as provided by the bylaws. That committee conducted another hearing and found that although plaintiff's behavior had perhaps been disruptive, it was not so disruptive as to harm the patients. Therefore, it recommended that plaintiff be reinstated for a one-year probationary period.

Pursuant to the bylaws, the review committee reported its conclusions back to the executive committee which rejected the review committee's conclusions and reaffirmed plaintiff's suspension. The executive committee asked plaintiff to appear before it within 30 days to offer testimony to show that he intended to work harmoniously. If he did so, it would reinstate him on a probationary basis. They warned him that if he did not so respond he would be permanently suspended.

Plaintiff did not respond and was permanently suspended. He appealed his suspension to the hospital Board of Directors (board). It concluded that plaintiff's disruptive behavior impaired the function of the radiology department which, in turn, was "inconsistent with the best interest of patients' care." It therefore affirmed the permanent suspension. Thereafter, a joint conference committee of the hospital voted unanimously to approve the board's action. The board reaffirmed its position in a subsequent meeting. Three months later plaintiff filed this suit.

Plaintiff's due process argument is:

> "The actions of private, non-profit hospitals are so effected [sic] and intertwined with the public nature of a hospital that such hospital must afford physicians some element of due process of law."

He identifies the following sources of this due process right: common law, Article 1, section 10, of the Oregon Constitution, and the Fourteenth Amendment of the

United States Constitution,[2] each of which will be considered in turn.

The term "common law due process" is unfortunate because of the tendency to confuse it with Fourteenth Amendment due process; "fair procedure" is a better term. In those states which recognize it, it is a rule having both substantive and procedural aspects which controls the actions of some private entities.[3] In *Pinsker v. Pacific Coast Soc. of Orthodontists,* 1 Cal 3d 160, 81 Cal Rptr 623, 460 P2d 495 (1969), for example, California adopted a common law requirement of "fair procedure" for private orthodontic associations, even though membership in such organizations was not necessary to practice orthodontics, because membership in the associations was "a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty." 460 P2d at 499. The follow-up case, *Pinsker v. Pacific Coast Soc. of Orthodontists,* 12 Cal 3d 541, 116 Cal Rptr 245, 526 P2d 253 (1974), holds that arbitrary conduct by an organization such as the Society of Orthodontists is forbidden by the common law, and that "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner." 526 P2d at 259.

Plaintiff contends there is a duty of fair procedure placed upon defendant in suspending his hospital privileges because those privileges are very important to plaintiff in pursuing his career and that the trial

[2] Plaintiff makes the common error of asserting that all these "due process" provisions are violated at once, whereas, in fact, if the common law gives him the rights he seeks, the constitutions are not violated, and if the state constitution gives him those rights, the federal constitution is not violated. *See* Linde, *Without "Due Process"—Unconstitutional Law in Oregon,* 49 Or L Rev 125, 133-35 (1970).

[3] *E.g., Ascherman v. San Francisco Medical Society,* 39 Cal App 3d 623, 114 Cal Rptr 681 (1974); *Falcone v. Middlesex Co. Medical Soc.,* 34 NJ 582, 170 A2d 791 (1961).

court erred in granting the partial summary judgment. He states that the cases which recognize such a right require "a hearing, timely notification sufficiently prior to the hearing to allow adequate preparation of defense, a written statement of the charges against the individual, and the right to call his own witnesses before the committee." This court has never decided whether there is such a duty in Oregon, and it is unnecessary to do so in this case because, if such duty exists, it was complied with in this case. *Compare Huffaker v. Bailey,* 273 Or 273, 540 P2d 1398 (1975).[4]

Plaintiff points out all sorts of procedural shortcomings in the hearings he was afforded by the hospital staff which would be more appropriate had they been addressed to a court proceeding. This was a proceeding conducted by non-legally trained persons and there is no necessity that it be conducted with the preciseness of a trial at law or equity in order to be procedurally fair. The executive committee hearing the matter was composed of approximately 20 physicians, many of whom chose to question witnesses despite the presence of attorneys representing both plaintiff and the hospital. Plaintiff contends he was not permitted to show bias and prejudice of witnesses. In fact he was allowed the usual means, which is cross-examination. He contends he was not given a concise statement of the charges against him. He was given information of specific circumstances that occurred in connection

[4] Subsequent to the proceedings before the hospital committees and boards, the legislature enacted ORS 441.055(3)(c), which provides:

> "(3) The governing body of each health care facility shall be responsible for the operation of the facility, the selection of the medical staff and the quality of care rendered in the facility. The governing body shall:
>
> "* * * * *.
>
> "(c) Insure that procedures for granting, restricting and terminating privileges exist and that such procedures are regularly reviewed to assure their conformity to applicable law * * *."

Or Laws 1977, ch 448, § 10, and ch 751, § 23a.

with the making of particular hospital records from which records he could have determined all necessary information. He secured as much or more information about the charges than he would have received from the average criminal indictment. He made no request for the relevant hospital records but proceeded to hearing.

Plaintiff contends he did not have an opportunity to call witnesses because defendant did not require the attendance of the witnesses he wished to examine. Defendant did not have subpoena power and, of course, could not require anyone's attendance. There is evidence that persons whom plaintiff requested to appear asked representatives of defendant whether they had to appear and were told, truthfully, they did not have to; but there is no evidence that defendant discouraged or dissuaded anyone who was so inclined from appearing and testifying. In fact, some persons did appear and testify in plaintiff's behalf.

Plaintiff complains that the committees before which the hearings were held were not impartial and that they considered information outside of the record. There was testimony that when the approximately 20-person executive committee deliberated after the hearings, as is usual with a jury, some things were discussed which were not relevant to the record and to the problem at hand. This situation was aggravated in that the difficulty between plaintiff and the other staff physicians and employees was of long standing and that many of the members of the committees and boards which sat in judgment were aware that things in the particular department in which plaintiff worked had not been all sweetness and light. However, we agree with the trial judge that plaintiff did not carry the burden of proving that the members prejudged the charges against him or that the proceeding was basically unfair.

Plaintiff charges that the bylaws and regulations for summary suspension were vague and overbroad

and were not followed. "Vagueness" is a fatal fault specifically in criminal law. *Compare State v. Hodges,* 254 Or 21, 457 P2d 491 (1969) *with Anderson v. Peden,* 284 Or 313, 324, 587 P2d 59 (1978). It is our conclusion that the bylaws were substantially complied with and that the standard, "in the best interests of patient care," is as definite as was practical. In *Huffaker v. Bailey, supra,* 273 Or at 276-77, we held that "a high quality of medical care" was not impermissibly vague.

Plaintiff contends that he was given no opportunity by the bylaws or in fact to be heard in advance of the summary suspension order. It is true the bylaws do not provide for any such hearing nor was he given one. Assuming that plaintiff is entitled to "fair procedure" under a common law theory, we cannot say that he is entitled to a pre-suspension hearing when the best interest of the patients may indicate to the contrary. In addition, the extent of the hearings to which he was entitled in order to receive fair treatment is related to that which he could reasonably expect when he entered into his relationship with the hospital. Fair procedure in a common law sense is not constitutional due process. When plaintiff joined defendant's medical staff he signified "his agreement to abide by these [the hospital's] bylaws and regulations" and they provided for immediate suspension if required by "the best interests of patient care in the hospital."

Plaintiff cites Article I, section 10, of the Oregon Constitution. It states:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Of course, if defendant's discharge of plaintiff did him a legal injury in his property, as he asserts, the proceedings in the trial court and in this court are precisely the remedy by due course of law to which the section entitles him. The question is not whether the

courts will afford him a remedy but whether defendant did him an injury under the law. In any event, Article I, section 10, itself does not direct the *defendant* to give him a remedy by due course of law. The section does not address a directive to private parties.

Plaintiff claims that the hospital is suffiently involved with the state to owe him "due process of law" under the Fourteenth Amendment of the United States Constitution.[5] He argues that "state action" is involved here because of "federal funding, charitable solicitation from the general public, federal tax exempt status, and vital service to the general public." However, he cites no authority that this is sufficient to constitute state action for the purpose of constitutional due process. In *Jackson v. Metropolitan Edison Co.*, 419 US 345, 95 S Ct 449, 42 L Ed 2d 477 (1974), the Court held that the action of a public utility in terminating service to a customer was not state action despite its regulation and its performance of an essential public service in which it possessed at least a partial monopoly. The action was not taken in the exercise of a power "which is traditionally associated with sovereignity." The performance of hospital services is not usually so associated.

For his next assignment of error plaintiff contends the trial court erred "in refusing to grant plaintiff a *de novo* review of the decision suspending plaintiff's staff privileges." Defendant contends that plaintiff is not entitled to judicial review at all. We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to "fair procedure" as a common law right. This could only be assured of by some sort of court review.

The bylaws in this case say nothing about judicial review *per se.* They do, however, provide for review by

[5] "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

various hospital committees to be conducted as follows:

> "The representative of the Board of Directors or Executive Committee shall have the obligation to introduce evidence in support of its action or recommendations, but the applicant or member of the medical staff for whom the hearing has been convened shall thereafter be required to bear the burden of proving that the action or recommendation in question was arbitrary or unreasonable."

There is nothing about the statute, the bylaws, or common sense which indicates that a court at either the trial or appellate level should decide the merits of plaintiff's dismissal. It would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care. Courts are not knowledgeable about hospital operations or patient care. The bylaws to which plaintiff agreed when he accepted staff privileges provide for the decision to be made by persons with training in those fields, and there is no reason for upsetting their decision so long as there was a rationale therefor. *Compare Huffaker v. Bailey, supra* at 280-81 (applying a "good faith and adequate factual basis" scope of review in a case where a hospital denied a doctor's application for admission to the staff).

Plaintiff's next assignment of error contends that there was no evidence upon which the trial court could find that the hospital acted for cause and in good faith. We disagree. A physician's inability to work with others which jeopardizes patient care is good cause for terminating his staff privileges. *Compare Huffaker v. Bailey, supra,* 273 Or at 277-79, which holds that a physician's application for staff admission may be denied for inability to work with others. The facts show an adequate basis for defendant to conclude that plaintiff *was* unable to work with others and that this inability *did* jeopardize patient care. Nothing is to be

gained by reciting the voluminous evidence upon the subject.

Plaintiff charges as error the trial court's finding that defendant followed its bylaws in connection with the summary and permanent suspension of plaintiff's staff privileges. In this regard plaintiff alleges a failure (1) to notify him in concise language of the grounds for the Executive Committee action; (2) to provide him with a review committee whose members did not actively participate at the Executive Committee level; (3) to provide him with a reasonable opportunity to be heard and to present evidence; and (4) to provide him the right to call, examine and cross-examine witnesses. With the exception of No. (2) above these are the same kind of deficiencies in procedure which he claimed deprived him of "fair procedure" as a common law right and which we discussed in deciding that issue. Since we have already determined that defendant did meet these procedural requirements, it is unnecessary to discuss further this assignment of error. With regard to the claim that plaintiff was not provided with a review committee whose members did not actively participate at the executive committee level,plaintiff admits that the review committee did not include any person who sat on both committees. However, he objects to the review committee's reviewing the transcript of the executive committee as well as to its taking testimony. It would seem reasonable that such should be the functions of a review committee, and plaintiff points to nothing in the bylaws which indicates they should not.

The decree of the trial court is affirmed.

FILED
IN THE CIRCUIT COURT
MULTNOMAH COUNTY, OREGON
77 JUN -6 PM 3:13

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

6 JUN 1977

KURT R. STRAUBE, M.D.,

Plaintiff,

vs.

ROGER LARSON, EMANUEL LUTHERAN CHARITY BOARD, a Corporation, dba EMANUEL HOSPITAL,

Defendants.

NO. 402-226

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

ENTERED IN JOURNAL
JUN 3 1977

Defendant Roger Larson's Demurrer having been argued, and sustained, and the plaintiff having not plead further, and

Defendant Emanuel Lutheran Charity Board, a corporation, dba Emanuel Hospital, having moved for summary judgment and, in the alternative, partial summary judgment, and

The remainder of the above entitled cause having come on regularly for trial before the above entitled Court on the 21st day of April, 1977, plaintiff appearing in person and by his attorneys Preston C. Hiefield, Jr., and Charles Paulson, defendant appearing by its attorneys Robert P. Jones, Robert M. Keating and John F. Folliard, Jr., testimony and exhibits on behalf of the parties having been received in evidence, the Court having heard and considered the testimony and having examined and considered the exhibits and having heard and considered arguments on behalf of the parties, and having filed a Memorandum Opinion, and

The Court now being fully advised, hereby makes the following Orders, Findings of Fact and Conclusions of Law and Decree:

WILLIAMS STARK HIEFIELD NORVILLE & GRIFFIN P.C.
ATTORNEYS AT LAW
728 BOISE CASCADE BUILDING
PORTLAND, OREGON 97201
TELEPHONE 223-9466

Appendix B

BOOK 1979 PAGE 2078

ORDERS

I.

The Court's judgment order on Demurrer, signed May 12, 1977, and entered May 13, 1977, marked Exhibit "A", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

The Court's order of partial summary judgment, signed March 29, 1977, and entered March 30, 1977, marked Exhibit "B", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

FINDINGS OF FACT

I.

The Court's written Opinion dated May 6, 1977, marked as Exhibit "C", is fully incorporated herein by reference as Findings of Fact.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff failed to prove the material allegations of his Complaint.

2. The summary suspension was authorized by the Hospital by-laws taken in good faith and with cause.

3. The Hospital hearings and procedures relating to the suspension did not violate Hospital by-laws.

WILLIAMS, STARK, HIEFIELD, NORVILLE & GRIFFIN, P.C.
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720 ROSE CASCADE BUILDING
PORTLAND, OREGON 97201
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12478

BOOK 1979 PAGE 2079

4. To date Plaintiff has suffered no monetary damages.

Based on the foregoing Orders, Findings of Fact and Conclusions of Law, the Court hereby makes and enters the following:

DECREE

NOW, THEREFORE, IT IS HEREBY ORDERED and DECREED that Plaintiff take nothing by his Complaint and that it be dismissed and that Defendant have, take and recover judgment against the Plaintiff its costs incurred herein taxed in the sum of $_____.

DATED this 3 day of June, 1977.

CLIFFORD B. OLSEN
CIRCUIT JUDGE

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720 ROSE CASCADE BUILDING
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12479

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D.,

Plaintiff,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL,

Defendant.

No. 402-226

JUDGMENT ORDER ON DEMURRER FOR DEFENDANT ROGER G. LARSON

This Court, having previously entened an order sustaining the Demurrer of Defendant Roger G. Larson, and Plaintiff not having pleaded further, it is hereby

ORDERED AND ADJUDGED that Defendant Roger G. Larson shall have judgment against Plaintiff for his costs as hereinafter taxed and that Plaintiff's Complaint be dismissed and Plaintiff shall take nothing thereby.

DATED this 2 day of May, 1977.

Clifford B. Olsen
Circuit Judge

JONES, LANG, KLEIN, WOLF & SMITH
ATTORNEYS AT LAW
One Eastwest Columbia
PORTLAND, OREGON 97205
TELEPHONE 223-4422

BOOK 1979 PAGE 2091

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D.,

Plaintiff,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL,

Defendant.

No. 402-226

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidavits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part I of the motion for full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

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ATTORNEYS AT LAW
One Eastwest Columbia
PORTLAND, OREGON 97205
TELEPHONE 223-4422

Exhibit "B"

BOOK 1979 PAGE 2083

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 7 day of March, 1977.

Clifford B. Olsen
Circuit Judge

BOOK 1979 PAGE 2083

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, Plaintiff, vs EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	No. 402-226 OPINION

STATEMENT OF FACTS

Plaintiff is a radiologist. For a number of years he was a member of Lloyd Center X-Ray, a group of radiologists who provided all x-ray services for Emanuel Hospital. Because most of plaintiff's efforts for the partnership related to hospital based activities he had staff privileges at Emanuel.

On January 30, 1975, the president of defendant hospital, Roger Larson, temporarilysuspended plaintiff's staff privileges. The letter advising plaintiff of the president's action recited in part: ". . . your recent actions have become so disruptive within the radiology department that we are having severe difficulties in maintaining technical staff to continue effective operation of the department; thus, in my opinion, this suspension is necessary in the best interests of patient care at Emanuel Hospital." (Ex. 11)

Plaintiff requested a hearing before the Staff Executive Committee. On February 19 and 20, 1975, a hearing was held. The majority of the committee found:

"The testimony presented has demonstrated that he (Dr. Straube) has been a disruptive influence on the function of and the harmony within the radiology department.

"It is in the opinion of the Executive Committee . . . that certain personality traits of Dr. Straube have contributed substantially to the current conflicts."

The Committee concluded:

1. Plaintiff's temporary suspension should be continued.

2. On July 21, 1973, the Committee would hear further testimony to ascertain whether or not plaintiff had resolved his "personality problems".

3. In the event of such resolution plaintiff's privileges would be restored upon a probationary basis effective August 1, 1973. (Ex. 17)

Plaintiff was dissatisfied and appealed the Executive Committee decision. Pursuant to the provisions of the By-Laws, a Review Committee was convened and hearings were held before that body between June 14 and September 12, 1973. On October 17, 1973, the Review Committee rendered its decision and concluded:

1. The testimony "suggested" that Dr. Straube had "been a disruptive influence on the function of and the harmony within the radiology department . . ."

2. The plaintiff's disruptive influence was not of "sufficient degree to result in harm to the patient(s)."

3. Plaintiff's "personality traits . . . have contributed substantially to the current conflicts."

4. The evidence was not sufficient to warrant summary suspensi

and

5. Plaintiff should be reinstated for a "one-year probationary period." (Ex. 25)

The conclusions of the Review Committed were reported to the Executive Committee, which on November 1, 1973:

1. Reaffirmed its earlier position;

2. Requested that plaintiff appear before the Committee within 30 days, at which time it would consider testimony from the plaintiff that he intends to work in the radiology department harmoniously;

3. Assuming plaintiff's testimony was satisfactory, the Executive Committee recommended that Dr. Straube be reinstated upon a probationary basis; and

4. In the event plaintiff did not respond to its request, the Executive Committee recommended permanent suspension.

Dr. Straube rejected the proposals of the Executive Committee and appealed his resultant permanent suspension to the Board of Directors. (Ex. 26) On December 4, 1973, the Board heard the appeal and found:

1. Dr. Straube had been a disruptive influence in the radiology department;

2. That the plaintiff's personality traits had contributed substantially to the conflicts and disharmony within the department;

3. That the department cannot function efficiently or satisfactorily with Dr. Straube on the staff; and

4. That the disruption and conflict which were determined to exist were "inconsistent with the best interest of patient care." (Ex. 9c)

The Joint Conference Committee received the action of the Board on December 12, 1973, and voted unanimously to approve the Board decision. The Board then reaffirmed its decision of December 4, 1973, at its next meeting, which was held in January 1974. (Exs. 9c and 9e)

On April 19, 1974, plaintiff filed this suit for reinstatement, injunctive relief and damages.

CONTENTIONS OF PLAINTIFF

Plaintiff's contentions are embodied in Paragraph VII of his third amended complaint. He contends:

1. Denial of due process (Paragraph VII a and b);

2. Failure of the defendant to comply with its own by-laws (VII c); and

3. No basis in fact existed to warrant suspension of plaintiff's staff privileges (Paragraph VII d).

On March 30, 1977, this Court entered an order for partial summary judgment in respect to plaintiff's first contention and this suit was heard upon the remaining two claims.

FINDINGS

Generally the Court finds that the defendant did follow and comply with the Emanuel Hospital Staff By-Laws in respect to the actions it took in respect to the plaintiff. Further, the Court is of the opinion that there was a basis in fact for defendant's decision to first temporarily suspend and finally terminate plaintiff's staff privileges. These general conclusions are predicated upon the following specific findings:

COMPLIANCE WITH THE BY-LAWS

Plaintiff urges that defendant failed to comply with the staff

by-laws in four particulars which will be considered in order.

First, it is claimed that defendant did not notify plaintiff in concise language the grounds of the Executive Committee action. (Ex. 6) Art. V, Section 1(c), provides in part and in effect upon receipt of a request for hearing before the Review Committee the secretary-treasurer of the Executive Committee will "notify the applicant . . . in concise language the grounds for the action (of the Executive Committee)".

On May 2, 1973, plaintiff was advised by registered mail of the time, place, date, and in concise language, the "charges" which were brought before the Executive Committee and to be reviewed by the Review Committee. Plaintiff objected that "charges" were distinct from "grounds". When the matter was not resolved between the parties and their attorneys, plaintiff went to court and obtained an order directing defendant to advise him of the "grounds" for the Executive Committee action. Thereafter, plaintiff was provided with a list of the "five grounds" for the action. The "grounds" were identical to the "charges" about which plaintiff was advised on May 2. (Exs. 20, 1 thru u)

Assuming that plaintiff was not initially advised of the "grounds" he was properly apprised of the "grounds" well before the first hearing at the Review level on June 14, 1973.

Secondly, plaintiff charges defendant did not select a Review Committee whose members did not participate at the Executive Committee level. The record established that the five members of the Review Committee were: (1) selected by the Executive Committee; (2) none of the Review Committee members were either members of or witnesses before the Executive Committee. It is difficult, therefore, to appreciate this

contention.

Upon argument counsel for plaintiff suggested that in effect the Review Committee participated in the Executive Committee proceeding because each member had before the June 14 hearing read the transcripts of the Executive Committee proceedings. The Court does not equate reading the record of a proceeding with participation in that proceeding.

Also it must be remembered that the Review Committee was charged with the responsibility of determining whether or not the Executive Committee's action or recommendation was arbitrary or unreasonable. Such a determination could only be made after a review of the evidence upon which the action or recommendation was based. The contention that the Review Committee was improperly manned is without merit. (See Ex. 6, Art, IV, Section 1(D), Staff By-Laws).

Thirdly, plaintiff maintains he was not afforded a reasonable opportunity to be heard and to present documentary evidence. The Court has on two occasions read the entire record of proceedings before Executive and Review Committees. These records demonstrate that plaintiff was given whatever time he desired to be heard. His opportunity to present evidence was unfettered. This charge is without merit. (See Exs. 1 through 5).

Finally, plaintiff alleges defendant failed to provide him with the right to call and examine witnesses, introduce exhibits and cross-examine witnesses. For the reasons expressed in regard to plaintiff's third contention, the Court finds no merit to the claim that he was not given the opportunity to introduce exhibits or cross-examine witnesses.

In respect to the remaining aspect of this allegation, i.e.,

he was not provided the right to call witnesses, plaintiff apparently maintains the defendant in some manner should have compelled certain staff members and hospital employees whom he enumerated to testify before the Review Committee. Of course, the defendant had in fact no legal right to compel any person to attend the hearing - it has no subpoena powers. A fair reading of Art. V, Section 2D, of the by-laws, (pertaining to members' right to call and examine witnesses) suggests the member may request any witness he desires to attend the hearing. In the event the witness is in attendance, the member must be given the right to examine the witness. This subsection of the by-laws cannot be construed to mean the Committee has the obligation to produce any particular person or persons requested by the member. In the Court's view the Committee complied with the by-laws when the Committee permitted plaintiff to examine any witness he was able to voluntarily get to attend the proceeding.

A more serious question might exist if the defendant or the Review Committee actively discouraged witnesses plaintiff desired to call from attending the hearings. The record, however, does not establish that this occurred.

Plaintiff wrote nineteen individuals and requested their attendance before the Review Committee. Apparently some of these individuals inquired of defendant's attorney if they had to attend. They were told that they did not, but that they were free to do so if they wished. No-one was discouraged or urged not to accede to plaintiff's request.

It is worth noting that of the nineteen individuals plaintiff solicited, three did appear before the Committee. Eleven had testified before and had been cross-examined by plaintiff's attorney at the Executiv

Committee hearings. Of the remainder only one witness (Doris Kelly) was considered important enough to depose for the purposes of this trial. (Exs. 22a and b; Exs. 1-5). The Court concludes there is no merit to this allegation, but even if the claim is technically meritorious, the plaintiff did not suffer thereby.

NO BASIS IN FACT FOR THE SUSPENSION OF PLAINTIFF'S STAFF PRIVILEGES

It was the conclusion of the Executive Committee and the Review Committee that the evidence those bodies considered demonstrated that plaintiff had been a "disruptive influence" in the radiology department and that his "personality traits . . . have contributed substantially to the current conflict". (Exs. 17 and 25). Neither body found any other basis for the action recommended. The first inquiry, therefore, must be whether or not a "disruptive influence" or a personality that "substantially contributes to conflict" within a hospital department is a basis for suspension or termination of staff privileges. A recent decision of the Oregon Supreme Court leads to the conclusion that the inquiry must be answered in the affirmative. In Huffaker v. Bailey, 273 Or. 273, 540 P2d 1398 (1975), on p. 278, the Court stated:

> "Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients."

The remaining inquiry, therefore, is whether in fact the evidence supports the conclusions that led to plaintiff's suspension.

It is frequently difficult to demonstrate the cause of disruption and conflict because it so often consists of a pattern of behavior as opposed to isolated but dramatic events. The "case" against Dr. Straube falls into the former category.

Having read the transcripts, the Court sensed that the plaintiff was in fact disruptive and the cause of turmoil in the radiology department. The following incidents, while not inclusive, are typical of the actions of the plaintiff which compelled the conclusions last expressed.(1)

Fred Warren, chief technician in the radiology department, on one occasion thanked a technician on behalf of "Dr. Haugen (chief of the radiology department) and myself" for their good work. Dr. Straube took umbrage with Warren because his (Straube's) thanks were not also included (Ex. 1, p. 74).

Warren suggested to plaintiff he might approach Dr. Haugen and inquire what he (Dr. Straube) might do to help the department accomplish its goals and objectives. Dr. Straube replied it was against his moral and ethical character to do that (Ex. 1, p. 103).

Ardis Clark, a supervisor of the outpatient department, testified that plaintiff was late in her department two out of five days per week. His lateness varied from one-half hour to two hours. Dr. Straube was the only doctor who was late without explanation or making arrangements for cover (Ex. 1, pp. 123-125).

On another occasion Mrs. Clark complained about Dr. Straube's tardiness and he told her "the patient doesn't come first; Dr. Straube comes first". (Ex. 1, p. 127).

Jeanne Shanander, assistant coordinator, special procedures department, reported that Dr. Straube left a patient on the x-ray table for an hour while he closeted himself with another doctor. After many requests for his presence, Mrs. Shanander was requested to find a resident to complete the procedure (pp. 136, 137).

On another occasion Dr. Straube delayed a procedure when he went for coffee. When the treating doctor showed up inquiring after the patient, Dr. Straube suggested the delay was the fault of Mrs. Shanander because she had not obtained a film he had ordered. The witness testified that in fact Dr. Straube had not ordered such film (p. 140). This witness had entertained resignation because of the "hassle" with Dr. Straube in the department. She attributed tension and disorganization in the department to Dr. Straube and reported that "the department runs more smoothly when Dr. Straube isn't there" (pp. 143-145).

Del Velenchenko, special procedures supervisor, related that Dr. Straube was frequently late for procedures without advising the staff. This, he related, tied up the procedure room to the detriment of the patient and others wanting the room (Ex. 1, p. 154).

He also described plaintiff's practice of scheduling "dummy arteriograms" which precluded scheduling viable procedures (P. 154). This witness related an instance when plaintiff delayed a procedure so another doctor "could not use his room" (p. 159).

On January 29, 1973, plaintiff caled Velenchenko at his home after Dr. Straube had learned that the witness had documented several instances of his lateness. The conversation of his which was taped by Dr. Straube and overheard by Dr. Banks was a forty-minute tirade (Ex. 75,

Ex. 1, p. 163). The following day plaintiff ordered Velenchenko into a view room, turned off all the lights but one view box because "I want to see the expression on your face when I talk to you." Plaintiff then inquired further about the practice of documenting plaintiff's tardiness.

Dr. Seapy, a resident in the radiology department, related an instance when plaintiff, to the witness's humiliation, directed the surgical nurse to assist with a special procedure while Seapy acted as circulating nurse (Ex. 1, p. 248).

On another occasion Dr. Seapy was examining a patient who was apparently unconscious. Dr. Straube came by and criticised Dr. Seapy for not recognizing that the patient was a "kook". When Dr. Seapy protested that he would rather lose his pride than not be careful, Dr. Straube told him "It's not a matter of pride; it's a matter of stupidity." It then developed that Dr. Straube had been informed in advance that the patient was in fact a "kook".

In the fall of 1972 a letter was addressed to the Residency Program. The letter was apparently delivered to Dr. Burton. He held the letter for a period and then passed it on to Dr. Haugen. Dr. Haugen failed to act on the matter promptly with the result that two of the residents were late in submitting their applications for the Board examinations. Appropriately, the letter should have been brought to Dr. Straube as director of the residency, immediately. Instead of treating the matter as an internal problem, albeit serious, plaintiff used the incident as an opportunity to write an extremely critical letter about Dr. Haugen to Dr. Richard Hopkins, the president of the hospital staff (Ex. 10a).

In December Dr. Haugen, as chief of radiology, changed the

scheduling procedures in the department. This action precipitated another letter. This letter was sent special delivery to Dr. Hanson, the man with whom the plaintiff associated daily at the hospital, at his home, with a copy to Dr. Hopkins. The letter concluded ". . . further threats and intimidation against me by you must not reoccur in the future, nor should you continue to display an attitude of arrogance and persistent refusal of cooperation" (Ex. 10b).

On January 30, 1973, the day the temporary suspension was issued twelve of the radiology technicians sought an audience with Mr. Larson to air their criticisms of Dr. Straube (Ex. 1, p. 23).

The foregoing incidents, while not separately significant, support the conclusions reached by the Executive Committee and the Review Committee that Dr. Straube was a "disruptive influence" and that his "personality traits" have contributed significantly to the current conflicts. Clearly there was a basis in fact for the suspension of plaintiff's staff privileges.(2)

OTHER ISSUES

For the reasons stated above the Court concludes that plaintiff has utterly failed to carry the burden upon the central issues and accordingly defendant should have a decree in its favor. While not essential to the resolution of the case, it is perhaps appropriate to comment on other issues.

TEMPORARY SUSPENSION

While the pleadings do not specifically frame the issue, it is clear plaintiff is offended by the fact that his privileges were temporarily suspended by the president of the defendant without a hearing.

There may be a basis for his complaint. The Review Committee specifically found the summary suspension unwarranted. The problem in the x-ray department did not suddenly appear on January 30, 1972 - it had festered for years, and it is difficult to understand why plaintiff's privileges could not have been continued nineteen more days until the Executive Committee could have considered the matter as a complaint rather than as an accomplished suspension which it could "continue, modify or terminate". See Ex. 6, Staff By-Laws, Art. IV.

As the Court concluded above, there was a basis for plaintiff's suspension, and the result may well have been the same. However, there is little question but that employment of the summary suspension engendered heat in an already agitated situation. In the Court's view the summary suspension, for all practical purposes, eliminated the possibility of a resolution of the difficulty. The result is that, for all time, Emanuel Hospital, its staff and its patients, have lost the services of a dedicated and exceedingly talented practioner.

On the other hand, the action taken by the president was authorized by the by-laws. It is equally clear, in the Court's view, that the action was taken in good faith and surely not without cause.

DAMAGES

Plaintiff has continued to practice at Lloyd Center X-Ray. His income has not in fact suffered because he has lost the Emanuel Hospital affiliation. Plaintiff urges that when inflationary factors are considered, he has in fact lost income. The vagaries of private practice, however, make such a conclusionbased upon one year's experience, inconclusive and unreliable.

Further, plaintiff is a recognized expert in his field, and has many friends and associates throughout the world who could, and undoubtedly would, assist him in making other hospital connections. The Court recognizes that plaintiff's suspension will have some adverse effect upon him. It is, however, doubtful that it will be as devastating as Dr. Straube suggests. At this point plaintiff has suffered no monetary damages. That he will experience such loss in the future is illusory. Surely it has not been established by a preponderance of the evidence.

Mr. Jones will prepare a decree consistent with the foregoing. I suggest this opinion should suffice as "Findings" as requested by the plaintiff.

Dated this 6 day of May, 1977.

Clifford B. Olsen
CLIFFORD B. OLSEN
CIRCUIT JUDGE

(1) The Court recognizes that plaintiff denied that some of the incidents occurred and that in respect to others there was contrary evidence. Nevertheless, the Committees and the Board did have an evidentiary basis for their conclusions.

(2) Even the members of the Executive Committee who were opposed to the suspension of his privileges agreed Dr. Straube had been disruptive (Dr. Wiebe's testimony and Ex. 19c).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

ENTERED IN JOURNAL
MAR 30 1977

KURT R. STRAUBE, M.D.,

Plaintiff,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL,

Defendant.

No. 402-226

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidavits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part I of the motion for full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

JONES, LAND, KLEIN, WOLF & SMITH
ATTORNEYS AT LAW
PORTLAND, OREGON 97205

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 29 day of March, 1977.

Clifford B. Olsen
Circuit Judge

JONES, LANE, KLEIN, WOLF & SMITH
ATTORNEYS
ONE BUSHNELL CIRCLE
PORTLAND, OREGON 97205
TELEPHONE 223-5511

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MULTNOMAH COUNTY
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CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
PORTLAND, OREGON 97204
248-3347

CLIFFORD B. OLSEN
JUDGE

March 23, 1977

Mr. Richard E. Alexander
Attorney at Law
Boise Cascade Building
Portland, Oregon 97201

Mr. John F. Folliard, Jr.
Attorney at Law
1 S. W. Columbia
Portland, Oregon 97201

Mr. Charles E. Paulson
Attorney at Law
Standard Plaza
Portland, Oregon 97204

Re: Straube vs Emanuel Lutheran Charity Board,
dba Emanuel Hospital
No. 402-226

Gentlemen:

This matter is before the Court on defendant's motion for a summary judgment and in the alternative for a partial summary judgment. I have reviewed defendant's motion and plaintiff's memorandum in opposition thereto, and conclude that the motion for the summary judgment should be denied.

For the reasons previously stated in my letter dated November 18, 1975, I do not believe Emanuel Hospital is a public body or that its actions in respect to the plaintiff constitute state action. Therefore, the issues sought to be raised in Subparagraphs (a) and (b) of Paragraph VII, plaintiff's third amended complaint, do not raise viable issues. Accordingly, Paragraph II (1) of defendant's alternative motion for partial summary judgment is allowed.

The case of Pedah Company v. Hunt, 265 Or. 433, unequivocally expresses the present attitude of the Oregon Supreme Court in respect to punitive damages in equitable proceedings. Accordingly, plaintiff is not entitled to punitive damages in this proceeding and Paragraph II (4) of defendant's motion for partial summary judgment is allowed.

As this case evolved the Court has proceeded upon the assumption that the relationship between staff physicians and hospitals are contractual in nature. Staff privileges are valuable and unique. I am of the opinion they should only be terminated in good

faith upon "an adequate factual basis" established in accordance with procedures provided in the hospital by-laws. I am unable to determine from the record whether or not the decision to terminate Dr. Straube was predicated upon an actual factual basis arrived in accordance with the procedures contained in the defendant's by-laws. Accordingly, Paragraphs I, II and III of defendant's motion for partial summary judgment are denied.

Mr. Polliard will prepare an order consistent with the foregoing for the Court's signature.

Very truly yours,

Clifford B. Olsen
Circuit Judge

CBO:nt

(43)

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
PORTLAND, OREGON 97204
248-3347

CLIFFORD B. OLSEN
JUDGE

November 18, 1975

FILED
NOV 20 1975
CIRCUIT COURT
Multnomah County, Oregon

Mr. Richard E. Alexander
Attorney at Law
Boise Cascade Building
Portland, Oregon 97201

Mr. Robert M. Keating
Attorney at Law
Morgan Park Building
Portland, Oregon 97205

Re: Straube vs Larson et al.
No. 402-226

Gentlemen:

I indicated to Mr. Alexander at the Rule 4.00 hearing last Wednesday that I am going to overrule the demurrer to plaintiff's complaint. I don't mean to suggest that the trial judge will be bound by my reasoning, but I thought that the record should reflect my thinking in this case.

I do not believe that Emanuel Hospital is a quasi-public body and surely Mr. Larson is not a public official. The actions of the hospital and/or Mr. Larson, therefore, do not constitute state action. Accordingly I do not believe the constitutional issues raised by plaintiff's complaint are viable.

On the other hand, I do find that a staff physician has a protectible interest in the enforcement of a hospital's by-laws. Probably the interest is a contract interest and protectible as any contract right. Because part of plaintiff's claim relates to the alleged failure of the defendants to comply with the hospital by-laws, I am of the opinion that the complaint states a cause of action and the demurrer should accordingly be overruled.

Very truly yours,

Clifford B. Olsen
Circuit Judge

CBO:nt
Encls.

C-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	NO. 74-307
	)	
v.	)	OPINION
	)	
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,	)	
	)	
Defendants.	)	

Charles Paulson
605 Standard Plaza
Portland, Oregon 97204
Attorney for Plaintiff

Robert P. Jones
Robert M. Keating
McMenamin, Jones, Joseph & Lang
500 Morgan Park Building
Portland, Oregon 97205
Attorneys for Defendants

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	No. 74-308
	)	
v.	)	OPINION
	)	
ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D. TO AND INCLUDING FIFTIETH DOE, M.D.,	)	
	)	
Defendants.	)	

Charles Paulson
605 Standard Plaza
Portland, Oregon 97204
Attorney for Plaintiff

Robert P. Jones
Robert M. Keating
McMenamin, Jones, Joseph & Lang
500 Morgan Park Building
Portland, Oregon 97205
Of Attorneys for Defendants

A. Allan Franzke
J. Laurence Cable
Souther, Spaulding, Kinsey, Williamson & Schwabe
1200 Standard Plaza
Portland, Oregon 97204
Attorneys for John C. English

SKOPIL, Judge:

Plaintiff, Kurt R. Straube, M.D., asserts that he was deprived of his Fourteenth Amendment rights by defendants, Emanuel Lutheran Charity Hospital Board and its president, Roger Larson.

Plaintiff, in a second Complaint, alleges that Larson and defendant-doctors, English, Seapy, and Helm, conspired to deprive him of equal protection under the law.

The defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(b)(1) and (b)(6).

Plaintiff, a radiologist, was a meber of the staff of Emanuel Hospital. On February 22, 1973, Larson, the hospital president, temporarily suspended plaintiff's staff privileges. In January of 1974 Emanuel's executive board permanently suspended plaintiff from the staff. Plaintiff avers that his suspensions were neither preceded by a hearing nor justified. He contends that Larson and defendant-doctors conspired to effect his dismissal and destroy his professional reputation.

This is a civil rights action authorized under 42 U.S.C. §1983 and §1985. Jurisdiction is invoked pursuant to 28 U.S.C. §1343.

Plaintiff's initial hurdle is jurisdiction. He must show state involvement in the hospital's suspension of his staff privileges before federal law will apply. He contends that several factors establish "state action" by the defendants:

(1) Emanuel Hospital is impressed with a public responsibility.

(2) Emanuel receives substantial state and federal benefits, including funds under the Hill-Burton Act, 42 U.S.C. §200 et seq.

(3) Emanuel is permitted to issue tax-exempt bonds.

He also asserts that Emanuel had a co-operation agreement with the City of Portland in Urban Renewal projects.

Emanuel is a private, non-profit hospital organized for charitable purposes. It is "only by sifting facts and weighing circumstances that the non-obvious involvement of the State can be attributed its true significance". Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

There is a split of authority as to whether the above factors clothe private hospitals with the requisite "state action". The cases cited by plaintiff fail to associate the claimed state involvement with the challenged activity. They fail to apply the nexus requirement set out by the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the controlling decision in the area of private versus state action.

Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. He contended that the grant of a liquor license by the state liquor authority implicated the state in actions by the club. The Court concluded that the regulatory scheme did not foster or encourage the club's racially discriminatory practices.

The Court limited the doctrine of state action by requiring a connection between the injury and the governmental presence.

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject

> "to State regulation in any degree whatsoever. Since State-furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions." Moose Lodge, 407 U.S. at 173.

Barret v. United States, _____ F. Supp. _____, S.D. N.Y. Docket No. 73 Civ. 1716 (1974), presents a thorough analysis of all the major cases cited by both sides. Barret involved facts similar to those alleged in plaintiff's Complaints. The Court applied the Moose Lodge requirement of a connection between governmental activity and a civil rights injury.

The Court also noted that the cases which subjected private institutions to the limitations of §1983 generally involved either racial discrimination or activities which are traditionally the exclusive province of state or municipal governments. Barret rejected the notion that private hospitals carry on traditional government functions.

As noted in Moose Lodge, the Civil Rights Act is not intended to provide a general federal tort claims remedy. Plaintiff could conceivably find some degree of state involvement in virtually every major private

institution existing today. Plaintiff's Complaints fail to allege the necessary nexus between governmental involvement with Emanuel Hospital and his suspension from staff privileges. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Plaintiff's second Complaint alleges a conspiracy in violation of 42 U.S.C. §1985. The Supreme Court in Griffin v. Breckinridge, 403 U.S. 88 (1971), held that before a cause of action exists under §1985 "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions". Griffin at 102. Plaintiff has not alleged any class-based discrimination. His Complaint fails to satisfy the requirements of the statute. Jackson v. Norton Children's Hospital, 487 F.2d 502 (6th Cir. 1973); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).

Defendants' motions to dismiss are granted. A final order will be entered dismissing plaintiff's Complaints.

Dated this 7th day of October, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff, v. ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	CIVIL 74-307 JUDGMENT

KURT R. STRAUBE, M.D., Plaintiff, v. ROGER G. LARSON, JOHN C. ENGLISH, et al., Defendants.	)	CIVIL 74-308 JUDGMENT

Based upon the Opinion of the Court entered contemporaneously herewith,

IT IS ORDERED and ADJUDGED that defendants' motions to dismiss are granted, that plaintiff shall take nothing, and the cases are dismissed on the merits.

DATED this 8th day of October, 1974.

/s/ Robert M. Christ
ROBERT M. CHRIST, CLERK OF COURT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KURT R. STRAUBE, M.D., *Appellant*, vs. ROGER G. LARSON, et al., *Appellees*.		No. 74-3496 No. 74-3497 MEMORANDUM

[March 18, 1976]

Appeal from the United States District Court
for the District of Oregon

Before: ELY and TRASK, Circuit Judges, and
CHRISTENSEN, District Judge.*

Straube, a radiologist, was suspended from the staff of Emanuel Hospital, allegedly without a hearing or justification. The District Court dismissed his civil rights claims, brought under 42 U.S.C. § 1983, for lack of "state action". We affirm.

Emanuel Hospital is a private charitable institution receiving public funds and certain tax advantages. These facts alone are insufficient to establish the required state action. *See Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975); *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975).

Straube contends that the hospital's connection with an urban renewal project of the City of Portland establishes the necessary state nexus. We disagree. The key to a determination of state action is that the state must be significantly involved in the specific activity of which complaint is made. *Watkins, supra;*

*Honorable A. Sherman Christensen, Senior United States District Judge, Salt Lake City, Utah, sitting by designation.

Ascherman v. Presbyterian Hosp. of Pac. Med. Co., Inc., 507 F.2d 1103 (9th Cir. 1974); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974). Here there is no such allegation. That the hospital and the City are parties to an urban renewal project is an example of a state contact, but nothing indicates that Portland is involved in the hospital's decisions in respect to the hospital's personnel.

AFFIRMED.

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Supreme Court, U.S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1430

KURT R. STRAUBE, M.D.,

Petitioner,

v.

EMANUEL LUTHERAN CHARITY BOARD,
a corporation, dba EMANUEL HOSPITAL,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE OREGON SUPREME COURT

November 21, 1979

Preston C. Hiefield, Jr.
Attorney at Law
775 Boise Cascade Building
Portland, OR 97201

Richard E. Alexander
Attorney at Law
900 S. W. Fifth 23rd Floor
Portland, OR 97204

Re: Straube vs. Emanuel Lutheran Charity Board SC 25276

Dear Counsel:

The Supreme Court on November 20, 1979, denied Appellant's Petition for Rehearing in the above-entitled matter.

Very truly yours,

/s/ Marilyn Hartley
Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: William L. Hallmark

APPENDIX A

STATE OF OREGON

SUPREME COURT

KURT R. STRAUBE, M.D.,	)	
	)	JUDGMENT and
Appellant,	)	MANDATE
	)	
v.	)	Appeal from
	)	MULTNOMAH County
EMANUEL LUTHERAN CHARITY	)	Circuit Court
BOARD, a corporation, dba	)	
Emanuel Hospital,	)	No. 402 226
	)	
Respondent.	)	SC 25276

IT IS HEREBY ADJUDGED and ORDERED that the respondent's motion to dismiss the appeal filed June 3, 1977, from the order of May 13, 1977, is allowed.

This cause having come on to be heard on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court taxed at $302.66.

The cause is returned below for further proceedings pursuant to law and the

opinion and order of the court entered September 18, 1979.

ISSUED at Salem, Oregon: Dec. 18, 1979.

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this Dec. 18, 1979.

LOREN D. HICKS
State Court Administrator

by_____
Deputy Administrator

No. 149—September 18, 1979

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

STRAUBE,
Appellant,
v.
EMANUEL LUTHERAN CHARITY BOARD,
Respondent.

(No. 402-226 SC 25276)

Appeal from Circuit Court, Multnomah County.

Clifford B. Olsen, Judge.

Argued and submitted February 6, 1979.

Richard E. Alexander, of Davies, Biggs, Strayer, Stoel & Boley, Portland, argued the cause for appellant. With him on the briefs was Preston C. Hiefield, Jr., of Williams, Stark, Hiefield, Norville & Griffin, P. C., Portland.

William L. Hallmark, Portland, argued the cause and filed a brief for respondent. With him on the brief were William A. Masters, and Jones, Lang, Klein, Wolf & Smith, Portland.

William P. Isele, Chicago, Illinois, filed a brief amicus curiae for the American Medical Association.

HOLMAN, J.

Affirmed.

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*TONGUE. J., did not participate in the decision of this case.

*BRYSON, J., retired April 1, 1979.

HOLMAN, J.

Plaintiff, a radiologist, brought this suit against defendant hospital for wrongful suspension of his staff privileges. He sought an order restoring them and enjoining the hospital from proceeding against him in the future unless it did so in compliance with due process and with its bylaws. Plaintiff also sought compensatory and punitive damages, attorney fees, and costs. Defendant moved for summary judgment which was partially granted on the due process issues. After trial on the remaining issues, the court concluded that defendant had complied with its bylaws and that there was a basis in fact for defendant's temporary and permanent suspensions of plaintiff's staff privileges. Plaintiff appealed from both the granting of the partial summary judgment and the final decree.[1]

It is not disputed that plaintiff is an excellent radiologist. Defendant suspended him for his inability to work with others at the hospital, an inability that assertedly interfered with adequate patient care. Plaintiff started working as a radiologist in 1963 at the Lloyd Center X-ray, a partnership that had an exclusive agreement with defendant to provide its radiology services. Plaintiff was temporarily suspended by the president of defendant. Pursuant to defendant's bylaws, plaintiff requested and got a hearing before the Medical Staff Executive Committee (executive committee) of defendant. The executive committee found that plaintiff was, in fact, a disruptive influence, and continued his suspension until a later date, when the executive committee would hear further evidence to see whether plaintiff had resolved his problems in his relationship with others; if so,

---

[1] Plaintiff also instituted an action against four individuals, claiming they tortiously interferred with his business relationship with defendant hospital. He also lost that case at the trial level and appealed. The appeal in that case was argued at the same time as the appeal in this case. *See Straube v. Larson*, ___ Or ___, ___ P2d ___ (1979), decided this day.

defendant would restore plaintiff's privileges on a probationary basis.

Plaintiff appealed this decision to the Review Committee (review committee) as provided by the bylaws. That committee conducted another hearing and found that although plaintiff's behavior had perhaps been disruptive, it was not so disruptive as to harm the patients. Therefore, it recommended that plaintiff be reinstated for a one-year probationary period.

Pursuant to the bylaws, the review committee reported its conclusions back to the executive committee which rejected the review committee's conclusions and reaffirmed plaintiff's suspension. The executive committee asked plaintiff to appear before it within 30 days to offer testimony to show that he intended to work harmoniously. If he did so, it would reinstate him on a probationary basis. They warned him that if he did not so respond he would be permanently suspended.

Plaintiff did not respond and was permanently suspended. He appealed his suspension to the hospital Board of Directors (board). It concluded that plaintiff's disruptive behavior impaired the function of the radiology department which, in turn, was "inconsistent with the best interest of patients' care." It therefore affirmed the permanent suspension. Thereafter, a joint conference committee of the hospital voted unanimously to approve the board's action. The board reaffirmed its position in a subsequent meeting. Three months later plaintiff filed this suit.

Plaintiff's due process argument is:

> "The actions of private, non-profit hospitals are so effected [sic] and intertwined with the public nature of a hospital that such hospital must afford physicians some element of due process of law."

He identifies the following sources of this due process right: common law, Article 1, section 10, of the Oregon Constitution, and the Fourteenth Amendment of the

United States Constitution,[2] each of which will be considered in turn.

The term "common law due process" is unfortunate because of the tendency to confuse it with Fourteenth Amendment due process; "fair procedure" is a better term. In those states which recognize it, it is a rule having both substantive and procedural aspects which controls the actions of some private entities.[3] In *Pinsker v. Pacific Coast Soc. of Orthodontists,* 1 Cal 3d 160, 81 Cal Rptr 623, 460 P2d 495 (1969), for example, California adopted a common law requirement of "fair procedure" for private orthodontic associations, even though membership in such organizations was not necessary to practice orthodontics, because membership in the associations was "a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty." 460 P2d at 499. The follow-up case, *Pinsker v. Pacific Coast Soc. of Orthodontists,* 12 Cal 3d 541, 116 Cal Rptr 245, 526 P2d 253 (1974), holds that arbitrary conduct by an organization such as the Society of Orthodontists is forbidden by the common law, and that "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner." 526 P2d at 259.

Plaintiff contends there is a duty of fair procedure placed upon defendant in suspending his hospital privileges because those privileges are very important to plaintiff in pursuing his career and that the trial

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[2] Plaintiff makes the common error of asserting that all these "due process" provisions are violated at once, whereas, in fact, if the common law gives him the rights he seeks, the constitutions are not violated, and if the state constitution gives him those rights, the federal constitution is not violated. *See* Linde, *Without "Due Process"—Unconstitutional Law in Oregon,* 49 Or L Rev 125, 133-35 (1970).

[3] *E.g., Ascherman v. San Francisco Medical Society,* 39 Cal App 3d 623, 114 Cal Rptr 681 (1974); *Falcone v. Middlesex Co. Medical Soc.,* 34 NJ 582, 170 A2d 791 (1961).

court erred in granting the partial summary judgment. He states that the cases which recognize such a right require "a hearing, timely notification sufficiently prior to the hearing to allow adequate preparation of defense, a written statement of the charges against the individual, and the right to call his own witnesses before the committee." This court has never decided whether there is such a duty in Oregon, and it is unnecessary to do so in this case because, if such duty exists, it was complied with in this case. *Compare Huffaker v. Bailey,* 273 Or 273, 540 P2d 1398 (1975).[4]

Plaintiff points out all sorts of procedural shortcomings in the hearings he was afforded by the hospital staff which would be more appropriate had they been addressed to a court proceeding. This was a proceeding conducted by non-legally trained persons and there is no necessity that it be conducted with the preciseness of a trial at law or equity in order to be procedurally fair. The executive committee hearing the matter was composed of approximately 20 physicians, many of whom chose to question witnesses despite the presence of attorneys representing both plaintiff and the hospital. Plaintiff contends he was not permitted to show bias and prejudice of witnesses. In fact he was allowed the usual means, which is cross-examination. He contends he was not given a concise statement of the charges against him. He was given information of specific circumstances that occurred in connection

[4] Subsequent to the proceedings before the hospital committees and boards, the legislature enacted ORS 441.055(3)(c), which provides:

"(3) The governing body of each health care facility shall be responsible for the operation of the facility, the selection of the medical staff and the quality of care rendered in the facility. The governing body shall:

"* * * * *.

"(c) Insure that procedures for granting, restricting and terminating privileges exist and that such procedures are regularly reviewed to assure their conformity to applicable law * * *."

Or Laws 1977, ch 448, § 10, and ch 751, § 23a.

with the making of particular hospital records from which records he could have determined all necessary information. He secured as much or more information about the charges than he would have received from the average criminal indictment. He made no request for the relevant hospital records but proceeded to hearing.

Plaintiff contends he did not have an opportunity to call witnesses because defendant did not require the attendance of the witnesses he wished to examine. Defendant did not have subpoena power and, of course, could not require anyone's attendance. There is evidence that persons whom plaintiff requested to appear asked representatives of defendant whether they had to appear and were told, truthfully, they did not have to; but there is no evidence that defendant discouraged or dissuaded anyone who was so inclined from appearing and testifying. In fact, some persons did appear and testify in plaintiff's behalf.

Plaintiff complains that the committees before which the hearings were held were not impartial and that they considered information outside of the record. There was testimony that when the approximately 20-person executive committee deliberated after the hearings, as is usual with a jury, some things were discussed which were not relevant to the record and to the problem at hand. This situation was aggravated in that the difficulty between plaintiff and the other staff physicians and employees was of long standing and that many of the members of the committees and boards which sat in judgment were aware that things in the particular department in which plaintiff worked had not been all sweetness and light. However, we agree with the trial judge that plaintiff did not carry the burden of proving that the members prejudged the charges against him or that the proceeding was basically unfair.

Plaintiff charges that the bylaws and regulations for summary suspension were vague and overbroad

and were not followed. "Vagueness" is a fatal fault specifically in criminal law. *Compare State v. Hodges*, 254 Or 21, 457 P2d 491 (1969) *with Anderson v. Peden*, 284 Or 313, 324, 587 P2d 59 (1978). It is our conclusion that the bylaws were substantially complied with and that the standard, "in the best interests of patient care," is as definite as was practical. In *Huffaker v. Bailey, supra*, 273 Or at 276-77, we held that "a high quality of medical care" was not impermissibly vague.

Plaintiff contends that he was given no opportunity by the bylaws or in fact to be heard in advance of the summary suspension order. It is true the bylaws do not provide for any such hearing nor was he given one. Assuming that plaintiff is entitled to "fair procedure" under a common law theory, we cannot say that he is entitled to a pre-suspension hearing when the best interest of the patients may indicate to the contrary. In addition, the extent of the hearings to which he was entitled in order to receive fair treatment is related to that which he could reasonably expect when he entered into his relationship with the hospital. Fair procedure in a common law sense is not constitutional due process. When plaintiff joined defendant's medical staff he signified "his agreement to abide by these [the hospital's] bylaws and regulations" and they provided for immediate suspension if required by "the best interests of patient care in the hospital."

Plaintiff cites Article I, section 10, of the Oregon Constitution. It states:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Of course, if defendant's discharge of plaintiff did him a legal injury in his property, as he asserts, the proceedings in the trial court and in this court are precisely the remedy by due course of law to which the section entitles him. The question is not whether the

courts will afford him a remedy but whether defendant did him an injury under the law. In any event, Article I, section 10, itself does not direct the *defendant* to give him a remedy by due course of law. The section does not address a directive to private parties.

Plaintiff claims that the hospital is suffiently involved with the state to owe him "due process of law" under the Fourteenth Amendment of the United States Constitution.[5] He argues that "state action" is involved here because of "federal funding, charitable solicitation from the general public, federal tax exempt status, and vital service to the general public." However, he cites no authority that this is sufficient to constitute state action for the purpose of constitutional due process. In *Jackson v. Metropolitan Edison Co.*, 419 US 345, 95 S Ct 449, 42 L Ed 2d 477 (1974), the Court held that the action of a public utility in terminating service to a customer was not state action despite its regulation and its performance of an essential public service in which it possessed at least a partial monopoly. The action was not taken in the exercise of a power "which is traditionally associated with sovereignity." The performance of hospital services is not usually so associated.

For his next assignment of error plaintiff contends the trial court erred "in refusing to grant plaintiff a *de novo* review of the decision suspending plaintiff's staff privileges." Defendant contends that plaintiff is not entitled to judicial review at all. We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to "fair procedure" as a common law right. This could only be assured of by some sort of court review.

The bylaws in this case say nothing about judicial review *per se*. They do, however, provide for review by

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5 "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

various hospital committees to be conducted as follows:

> "The representative of the Board of Directors or Executive Committee shall have the obligation to introduce evidence in support of its action or recommendations, but the applicant or member of the medical staff for whom the hearing has been convened shall thereafter be required to bear the burden of proving that the action or recommendation in question was arbitrary or unreasonable."

There is nothing about the statute, the bylaws, or common sense which indicates that a court at either the trial or appellate level should decide the merits of plaintiff's dismissal. It would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care. Courts are not knowledgeable about hospital operations or patient care. The bylaws to which plaintiff agreed when he accepted staff privileges provide for the decision to be made by persons with training in those fields, and there is no reason for upsetting their decision so long as there was a rationale therefor. *Compare Huffaker v. Bailey, supra* at 280-81 (applying a "good faith and adequate factual basis" scope of review in a case where a hospital denied a doctor's application for admission to the staff).

Plaintiff's next assignment of error contends that there was no evidence upon which the trial court could find that the hospital acted for cause and in good faith. We disagree. A physician's inability to work with others which jeopardizes patient care is good cause for terminating his staff privileges. *Compare Huffaker v. Bailey, supra,* 273 Or at 277-79, which holds that a physician's application for staff admission may be denied for inability to work with others. The facts show an adequate basis for defendant to conclude that plaintiff *was* unable to work with others and that this inability *did* jeopardize patient care. Nothing is to be

gained by reciting the voluminous evidence upon the subject.

Plaintiff charges as error the trial court's finding that defendant followed its bylaws in connection with the summary and permanent suspension of plaintiff's staff privileges. In this regard plaintiff alleges a failure (1) to notify him in concise language of the grounds for the Executive Committee action; (2) to provide him with a review committee whose members did not actively participate at the Executive Committee level; (3) to provide him with a reasonable opportunity to be heard and to present evidence; and (4) to provide him the right to call, examine and cross-examine witnesses. With the exception of No. (2) above these are the same kind of deficiencies in procedure which he claimed deprived him of "fair procedure" as a common law right and which we discussed in deciding that issue. Since we have already determined that defendant did meet these procedural requirements, it is unnecessary to discuss further this assignment of error. With regard to the claim that plaintiff was not provided with a review committee whose members did not actively participate at the executive committee level,plaintiff admits that the review committee did not include any person who sat on both committees. However, he objects to the review committee's reviewing the transcript of the executive committee as well as to its taking testimony. It would seem reasonable that such should be the functions of a review committee, and plaintiff points to nothing in the bylaws which indicates they should not.

The decree of the trial court is affirmed.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	No. 402-226
	)	
vs.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF
ROGER LARSON, EMANUEL	)	LAW AND DECREE
LUTHERAN CHARITY BOARD, a	)	
Corporation, dba EMANUEL	)	
HOSPITAL,	)	
	)	
Defendants	)	

Defendant Roger Larson's Demurrer having been argued, and sustained, and the plaintiff having not plead further, and

Defendant Emanuel Lutheran Charity Board, a corporation, dba Emanuel Hospital, having moved for summary judgment and, in the alternative, partial summary judgment, and

The remainder of the above entitled cause having come on regularly for trial before the above entitled Court on the 21st day of April, 1977, plaintiff appearing in person and by his attorneys Preston C. Hiefield, Jr., and Charles

Paulson, defendant appearing by its attorneys Robert P. Jones, Robert M. Keating and John F. Folliard, Jr., testimony and exhibits on behalf of the parties having been received in evidence, the Court having heard and considered the testimony and having examined and considered the exhibits and having heard and considered arguments on behalf of the parties, and having filed a Memorandum Opinion, and

The Court now being fully advised, hereby makes the following Orders, Findings of Fact and Conclusions of Law and Decree:

ORDERS

I.

The Court's judgment order on Demurrer, signed May 12, 1977, and entered May 13, 1977, marked Exhibit "A", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

The Court's order of partial summary judgment, signed March 29, 1977, and entered March 30, 1977, marked Exhibit "B", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

FINDINGS OF FACT

I.

The Court's written Opinion dated May 6, 1977, marked as Exhibit "C", is fully incorporated herein by reference as Findings of Fact.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff failed to prove the material allegations of his Complaint.

2. The summary suspension was authorized by the Hospital by-laws taken in good faith and with cause.

3. The Hospital hearings and procedures relating to the suspension did not violate Hospital by-laws.

4. To date Plaintiff has suffered no monetary damages.

Based on the foregoing Orders, Findings of Fact and Conclusions of Law, the Court hereby makes and enters the following:

DECREE

NOW, THEREFORE, IT IS HEREBY ORDERED and DECREED that Plaintiff take nothing by his Complaint and that it be dismissed and that Defendant have, take and recover judgment against the Plaintiff its costs incurred herein taxed in the sum of $_____.

DATED this 3rd day of June, 1977.

/s/ Clifford B Olsen
CLIFFORD B. OLSEN
CIRCUIT JUDGE

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	)	No. 402-226
v.	)	JUDGMENT ORDER ON DEMURRER FOR DEFENDANT ROGER G. LARSON
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	)	

This Court, having previously entened an order sustaining the Demurrer of Defendant Roger G. Larson, and Plaintiff not having pleaded further, it is hereby

ORDERED AND ADJUDGED that Defendant Roger G. Larson shall have judgment against Plaintiff for his costs as hereinafter taxed and that Plaintiff's Complaint be dismissed and Plaintiff shall take nothing thereby.

DATED this 12 day of May, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	No. 402-226
v.	ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidvits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part I of the motion for

full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 7 day of March, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE,

Plaintiff,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL,

Defendant.

No. 402-226

OPINION

STATEMENT OF FACTS

Plaintiff is a radiologist. For a number of years he was a member of Lloyd Center X-Ray, a group of radiologists who provided all x-ray services for Emanuel Hospital. Because most of plaintiff's efforts for the partnership related to hospital based activities he had staff privileges at Emanuel.

On January 30, 1973, the president of defendant hospital, Roger Larson, temporarily suspended plaintiff's staff privileges. The letter advising plaintiff of the president's action recited in part: ". . . your recent

actions have become so disruptive within the radiology department that we are having severe difficulties in maintaining technical staff to continue effective operation of the department; thus, in my opinion, this suspension is necessary in the best interests of patient care at Emanuel Hospital." (Ex. 11)

Plaintiff requested a hearing before the Staff Executive Committee. On February 19 and 20, 1973, a hearing was held. The majority of the committee found:

"The testimony presented has demonstrated that he (Dr. Straube) has been a disruptive influence on the function of and the harmony within the radiology department.

"It is the opinion of the Executive Committee . . . that certain personality traits of Dr. Straube have contributed substantially to the current conflicts."

The Committee concluded:

1. Plaintiff's temporary suspension should be continued.

2. On July 21, 1973, the Committee would hear further testimony to ascertain whether or not plaintiff had resolved his "personality problems".

3. In the event of such resolution plaintiff's privileges would be restored upon a probationary basis effective August 1, 1973. (Ex. 17)

Plaintiff was dissatisfied and appealed the Executive Committee decision. Pursuant to the provisions of the By-Laws, a Review Committee was convened and hearings were held before that body between June 14 and September 12, 1973. On October 17, 1973, the Review Committee rendered its decision and concluded:

1. The testimony "suggested" that Dr. Straube had "been a disruptive influence on the function of and the harmony within the radiology department . . ."

2. The plaintiff's disruptive influence was not of "sufficient degree to result in harm to the patient(s)."

3. Plaintiff's "personality traits . . . have contributed substantially to the current conflicts."

4. The evidence was not sufficient to warrant summary suspension and

5. Plaintiff should be reinstated for a "one-year probationary period." (Ex. 25)

The conclusions of the Review Committed were reported to the Executive Committee, which on November 1, 1973:

1. Reaffirmed its earlier position;

2. Requested that plaintiff appear before the Committee within 30 days, at which time it would consider testimony from the plaintiff that he intends to work in the radiology department harmoniously;

3. Assuming plaintiff's testimony was satisfactory, the Executive Committee recommended that Dr. Straube be reinstated upon a probationary basis; and

4. In the event plaintiff did not respond to its request, the Executive Committee recommended permanent suspension.

Dr. Straube rejected the proposals of the Executive Committee and appealed his resultant permanent suspension to the Board of Directors. (Ex. 26) On December 4, 1973, the Board heard the appeal and found:

1. Dr. Straube had been a disruptive influence in the radiology department;

2. That the plaintiff's personality traits had contributed substantially to the conflicts and disharmony within the department;

3. That the department cannot function efficiently or satisfactorily with Dr. Straube on the staff; and

4. That the disruption and conflict which were determined to exist were "inconsistent with the best interest of patient care." (Ex. 9c)

The Joint Conference Committee received the action of the Board on

December 19, 1973, and voted unanimously to approve the Board decision. The Board then reaffirmed its decision of December 4, 1973, at its next meeting, which was held in January 1974. (Exs. 9c and 9e)

On April 19, 1974, plaintiff filed this suit for reinstatement, injunctive relief and damages.

CONTENTIONS OF PLAINTIFF

Plaintiff's contentions are embodied in Paragraph VII of his third amended complaint. He contends:

1. Denial of due process (Paragraph VII a and b);

2. Failure of the defendant to comply with its own by-laws (VII c); and

3. No basis in fact existed to warrant suspension of plaintiff's staff privileges (Paragraph VII d).

On March 30, 1977, this Court entered an order for partial summary judgment in respect to plaintiff's first contention and this suit was heard upon the remaining two claims.

FINDINGS

Generally the Court finds that the defendant did follow and comply with the Emanuel Hospital Staff By-Laws in respect to the actions it took in respect to the plaintiff. Further, the Court is of the opinion that there was a basis in fact for defendant's decision to first temporarily suspend and finally terminate plaintiff's staff privileges. These general conclusions are predicated upon the following specific findings:

COMPLIANCE WITH THE BY-LAWS

Plaintiff urges that defendant failed to comply with the staff by-laws in four particulars which will be considered in order.

First, it is claimed that defendant did not notify plaintiff in concise language the grounds of the Executive Committee action. (Ex. 6) Art. V, Section 1(c), provides in part and in effect upon receipt of a request for hearing before the Review Committee the secretary-treasurer of the

Executive Committee will "notify the applicant . . . in concise language the grounds for the action (of the Executive Committee)".

On May 2, 1973, plaintiff was advised by registered mail of the time, place, date, and in concise language, the "charges" which were brought before the Executive Committee and to be reviewed by the Review Committee. Plaintiff objected that "charges" were distinct from "grounds". When the matter was not resolved between the parties and their attorneys, plaintiff went to court and obtained an order directing defendant to advise him of the "grounds" for the Executive Committee action. Thereafter, plaintiff was provided with a list of the "five grounds" for the action. The "grounds" were identical to the "charges" about which plaintiff was advised on May 2. (Exs. 20, 1 thru u)

Assuming that plaintiff was not initially advised of the "grounds" he was properly apprised of the "grounds" well

before the first hearing at the Review level on June 14, 1973.

Secondly, plaintiff charges defendant did not select a Review Committee whose members did not participate at the Executive Committee level. The record established that the five members of the Review Committee were: (1) selected by the Executive Committee; (2) none of the Review Committee members were either members of or witnesses before the Executive Comm. ctee. It is difficult, therefore, to appreciate this contention.

Upon argument counsel for plaintiff suggested that in effect the Review Committee participated in the Executive Committee proceeding because each member had before the June 14 hearing read the transcripts of the Executive Committee proceedings. The Court does not equate reading the record of a proceeding with participation in that proceeding.

Also it must be remembered that the Review Committee was charged with the responsibility of determining whether or not the Executive Committee's action or recommendation was arbitrary or unreasonable. Such a determination could only be made after a review of the evidence upon which the action or recommendation was based. The contention that the Review Committee was improperly manned is without merit. (See Ex. 6, Art, IV, Section 1(D), Staff By-Laws).

Thirdly, plaintiff maintains he was not afforded a reasonable opportunity to be heard and to present documentary evidence. The Court has on two occasions read the entire record of proceedings before Executive and Review Committees. These records demonstrate that plaintiff was given whatever time he desired to be heard. His opportunity to present evidence was unfettered. This charge is without merit. (See Exs. 1 through 5).

Finally, plaintiff alleges defendant failed to provide him with the

right to call and examine witnesses, introduce exhibits and cross-examine witnesses. For the reasons expressed in regard to plaintiff's third contention, the Court finds no merit to the claim that he was not given the opportunity to introduce exhibits or cross-examine witnesses.

In respect to the remaining aspect of this allegation, i.e., he was not provided the right to call witnesses, plaintiff apparently maintains the defendant in some manner should have compelled certain staff members and hospital employees whom he enumerated to testify before the Review Committee. Of course, the defendant had in fact no legal right to compel any person to attend the hearing - it has no subpoena powers. A fair reading of Art. V, Section 2D, of the by-laws, (pertaining to members' right to call and examine witnesses) suggests the member may request any witness he desires to attend the hearing. In the event the witness is

in attendance, the member must be given the right to examine the witness. This subsection of the by-laws cannot be construed to mean the Committee has the obligation to produce any particular person or persons requested by the member. In the Court's view the Committee complied with the by-laws when the Committee permitted plaintiff to examine any witness he was able to voluntarily get to attend the proceeding.

A more serious question might exist if the defendant or the Review Committee actively discouraged witnesses plaintiff desired to call from attending the hearings. The record, however, does not establish that this occurred.

Plaintiff wrote nineteen individuals and requested their attendance before the Review Committee. Apparently some of these individuals inquired of defendant's attorney if they had to attend. They were told that they did not, but that they were free to do so if they wished. No one was discouraged

or urged not to accede to plaintiff's request.

It is worth noting that of the nineteen individuals plaintiff solicited, three did appear before the Committee. Eleven had testified before and had been cross-examined by plaintiff's attorney at the Executive Committee hearings. Of the remainder only one witness (Doris Kelly) was considered important enough to depose for the purposes of this trial. (Exs. 22a and b; Exs. 1-5). The Court concludes there is no merit to this allegation, but even if the claim is technically meritorious, the plaintiff did not suffer thereby.

NO BASIS IN FACT FOR THE SUSPENSION OF PLAINTIFF'S STAFF PRIVILEGES

It was the conclusion of the Executive Committee and the Review Committee that the evidence those bodies considered demonstrated that plaintiff had been a "disruptive influence" in the radiology department and that his "personality traits . . . have contributed

substantially to the current conflict". (Exs. 17 and 25). Neither body found any other basis for the action recommended. The first inquiry, therefore, must be whether or not a "disruptive influence" or a personality that "substantially contributes to conflict" within a hospital department is a basis for suspension or termination of staff privileges. A recent decision of the Oregon Supreme Court leads to the conclusion that the inquiry must be answered in the affirmative. In Huffaker v. Bailey, 273 Or. 273, 540 P2d 1398 (1975), on p. 278, the Court stated:

> "Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients."

The remaining inquiry, therefore, is whether in fact the evidence supports the conclusions that led to plaintiff's suspension.

It is frequently difficult to demonstrate the cause of disruption and conflict because it so often consists of a pattern of behavior as opposed to isolated but dramatic events. The "case" against Dr. Straube falls into the former category.

Having read the transcripts, the Court sensed that the plaintiff was in fact disruptive and the cause of turmoil in the radiology department. The following incidents, while not inclusive, are typical of the actions of the plaintiff which compelled the conclusions last expressed.(1)

Fred Warren, chief technician in the radiology department, on one occasion thanked a technician on behalf of "Dr. Haugen (chief of the raiology department) and myself" for their good work. Dr. Straub took umbrage with

Warren because his (Straube's) thanks were not also included (Ex. 1, p. 74).

Warren suggested to plaintiff he might approach Dr. Haugen and inquire what he (Dr. Straube) might do to help the department accomplish its goals and objectives. Dr. Straube replied it was against his moral and ethical character to do that (Ex. 1, p. 103).

Ardis Clark, a supervisor of the outpatient department, testified that plaintiff was late in her department two out of five days per week. His lateness varied from one-half hour to two hours. Dr. Straube was the only doctor who was late without explanation or making arrangements for cover (Ex. 1, pp. 123-125).

On another occasion Mrs. Clark complained about Dr. Straube's tardiness and he told her "the patient doesn't come first; Dr. Straube comes first". (Ex. 1, p. 127).

Jeanne Shanander, assistant coordinator, special procedures department,

reported that Dr. Straube left a patient on the x-ray table for an hour while he closeted himself with another doctor. After many requests for his presence, Mrs. Shanander was requested to find a resident to complete the procedure (pp. 136, 137).

On another occasion Dr. Straube delayed a procedure when he went for coffee. When the treating doctor showed up inquiring after the patient, Dr. Straube suggested the delay was the fault of Mrs. Shanander because she had not obtained a film he had ordered. The witness testified that in fact Dr. Straube had not ordered such film (p. 140). This witness had entertained resignation because of the "hassle" with Dr. Straube in the department. She attributed tension and disorganization in the department to Dr. Straube and reported that "the department runs more smoothly when Dr. Straube isn't there" (pp. 143-145).

Del Velenchenko, special procedures supervisor, related that Dr. Straube was frequently late for procedures without advising the staff. This, he related, tied up the procedure room to the detriment of the patient and others wanting the room (Ex. 1, p. 154).

He also described plaintiff's practice of scheduling "dummy arteriograms" which precluded scheduling viable procedures (p. 154). This witness related an instance when plaintiff delayed a procedure so another doctor "could not use his room" (p. 159).

On January 29, 1973, plaintiff caled Velenchenko at his home after Dr. Straube had learned that the witness had documented several instances of his lateness. The conversation of his which was taped by Dr. Straube and overheard by Dr. Banks was a forty-minute tirade (Ex. 75, Ex. 1, p. 163). The following day plaintiff ordered Velenchenko into a view room, turned off all the lights but one

view box because "I want to see the expression on your face when I talk to you." Plaintiff then inquired further about the practice of documenting plaintiff's tardiness.

Dr. Seapy, a resident in the radiology department, related an instance when plaintiff, to the witness's humiliation, directed the surgical nurse to assist with a special procedure while Seapy acted as circulating nurse (Ex. 1, p. 248).

On another occasion Dr. Seapy was examining a patient who was apparently unconscious. Dr. Straube came by and criticised Dr. Seapy for not recognizing that the patient was a "kook". When Dr. Seapy protested that he would rather lose his pride than not be careful, Dr. Straube told him "It's not a matter of pride; it's a matter of stupidity." It then developed that Dr. Straube had been informed in advance that the patient was in fact a "kook".

In the fall of 1972 a letter was addressed to the Residency Program. The letter was apparently delivered to Dr. Burton. He held the letter for a period and then passed it on to Dr. Haugen. Dr. Haugen failed to act on the matter promptly with the result that two of the residents were late in submitting their applications for the Board examinations. Appropriately, the letter should have been brought to Dr. Straube as director of the residency, immediately. Instead of treating the matter as an internal problem, albeit serious, plaintiff used the incident as an opportunity to write an extremely critical letter about Dr. Haugen to Dr. Richard Hopkins, the president of the hosptial staff (Ex. 10a).

In December Dr. Haugen, as chief of radiology, changed the scheduling procedures in the department. This action precipitated another letter. This letter was sent special delivery to Dr. Haugen, the man with whom the

plaintiff associated daily at the hospital, at his home, with a copy to Dr. Hopkins. The letter concluded ". . . further threats and intimidation against me by you must not reoccur in the future, nor should you continue to display an attitude of arrogance and persistent refusal of cooperation" (Ex. 10b).

On January 30, 1973, the day the temporary suspension was issued twelve of the radiology technicians sought an audience with Mr. Larson to air their criticisms of Dr. Straube (Ex. 1, p. 23).

The foregoing incidents, while not separately significant, support the conclusions reached by the Executive Committee and the Review Committee that Dr. Straube was a "disruptive influence" and that his "personality traits" have contributed significantly to the current conflicts. Clearly there was a basis in fact for the suspension of plaintiff's staff privileges.(2)

OTHER ISSUES

For the reasons stated above the Court concludes that plaintiff has utterly failed to carry the burden upon the central issues and accordingly defendant should have a decree in its favor. While not essential to the resolution of the case, it is perhaps appropriate to comment on other issues.

TEMPORARY SUSPENSION

While the pleadings do not specifically frame the issue, it is clear plaintiff is offended by the fact that his privileges were temporarily suspended by the president of the defendant without a hearing. There may be a basis for his complaint. The Review Committee specifically found the summary suspension unwarranted. The problem in the x-ray department did not suddenly appear on January 30, 1972 - it had festered for years, and it is difficult to understand why plaintiff's privileges could not have been continued nineteen more days until the Executive Committee could have

considered the matter as a complaint rather than as an accomplished suspension which it could "continue, modify or terminate". See Ex. 6, Staff By-Laws, Art. IV.

As the Court concluded above, there was a basis for plaintiff's suspension, and the result may well have been the same. However, there is little question but that employment of the summary suspension engendered heat in an already agitated situation. In the Court's view the summary suspension, for all practical purposes, eliminated the possibility of a resolution of the difficulty. The result is that, for all time, Emanuel Hospital, its staff and its patients, have lost the services of a dedicated and exceedingly talented practioner.

On the other hand, the action taken by the president was authorized by the by-laws. It is equally clear, in the Court's view, that the action was taken

in good faith and surely not without cause.

DAMAGES

Plaintiff has continued to practice at Lloyd Center X-Ray. His income has not in fact suffered because he has lost the Emanuel Hospital affiliation. Plaintiff urges that when inflationary factors are considered, he has in fact lost income. The vagaries of private practice, however, make such a conclusion based upon one year's experience, inconclusive and unreliable.

Further, plaintiff is a recognized expert in his field, and has many friends and associates throughout the world who could, and undoubtedly would, assist him in making other hospital connections. The Court recognizes that plaintiff's suspension will have some adverse effect upon him. It is, however, doubtful that it will be as devastating as Dr. Straube suggests. At this point plaintiff has suffered no monetary damages. That he will

experience such loss in the future is illusory. Surely it has not been established by a preponderance of the evidence.

Mr. Jones will prepare a decree consistent with the foregoing. I suggest this opinion should suffice as "Findings" as requested by the plaintiff.

Dated this 6th day of May, 1977.

/s/ Clifford B. Olsen
CLIFFORD B. OLSEN
CIRCUIT JUDGE

(1) The Court recognizes that plaintiff denied that some of the incidents occurred and that in respect to others there was contrary evidence. Nevertheless, the Committees and the Board did have an evidentiary basis for their conclusions.

(2) Even the members of the Executive Committee who were opposed to the suspension of his privileges agreed Dr. Straube had been disruptive (Dr. Wiebe's testimony and Ex. 19c).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	No. 402-226
v.	ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidavits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part 1 of the motion for

full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 29 day of March, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CIRCUIT COURT OF OREGON
Fourth Judicial District
Portland, Oregon 97204
248-3247
March 23, 1977

Mr. Richard E. Alexander
Attorney at Law
Boise Cascade Building
Portland, Oregon 97201

Mr. Charles E. Paulson
Attorney at Law
Standard Plaza
Portland, Oregon 97204

Mr. John F. Folliard, Jr.
Attorney at Law
1 S. W. Columbia
Portland, Oregon 97201

Re: Straube vs Emanuel Lutheran Charity Board, dba Emanuel Hospital No. 402-226

Gentlemen:

This matter is before the Court on defendant's motion for a summary judgment and in the alternative for

a partial summary judgment. I have reviewed defendant's motion and plaintiff's memorandum in opposition thereto, and conclude that the motion for the summary judgment should be denied.

For the reasons previously stated in my letter dated November 18, 1975, I do not believe Emanuel Hospital is a public body or that its actions in respect to the plaintiff constitute state action. Therefore, the issues sought to be raised in Subparagraphs (a) and (b) of Paragraph VII, plaintiff's third amended complaint, do not raise viable issues. Accordingly, Paragraph II (1) of defendant's alternative motion for partial summary judgment is allowed.

The case of Pedah Company v. Hunt, 265 Or. 433, unequivocally expresses the present attitude of the Oregon Supreme Court in respect to punitive damages in equitable proceedings. Accordingly, plaintiff is not entitled to punitive damages in this

proceeding and Paragraph II (4) of defendant's motion for partial summary judgment is allowed.

As this case evolved the Court has proceeded upon the assumption that the relationship between staff physicians and hospitals are contractual in nature. Staff privileges are valuable and unique. I am of the opinion they should only be terminated in good faith upon "an adequate factual basis" established in accordance with procedures provided in the hospital by-laws. I am unable to determine from the record whether or not the decision to terminate Dr. Staube was predicated upon an actual factual basis arrived in accordance with the procedures contained in the defendant's by-laws. Accordingly, Paragraphs I, II and III of defendant's motion for partial summary judgment are denied.

Mr. Folliard will prepare an order consistent with the foregoing for the Court's signature.

Very truly yours,

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CBO:nt

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
Portland, Oregon 97204
248-3247
November 18, 1975

Mr. Richard E. Alexander
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Boise Cascade Building
Portland, Oregon 97201

Mr. Robert M. Keating
Attorney at Law
Morgan Park Building
Portland, Oregon 97205

Re: Straube vs Larson et al. No. 402-226

Gentlemen:

I indicated to Mr. Alexander at the Rule 4.00 hearing last Wednesday that I am going to overrule the demurrer to plaintiff's complaint. I don't mean to suggest that the trial judge will be bound by my reasoning, but I thought that the record should reflect my thinking in this case.

I do not believe that Emanuel Hospital is a quasi-public body and surely Mr. Larson is not a public official. The actions of the hospital and/or Mr. Larson, therefore, do not constitute state action. Accordingly I do not believe the constitutional issues raised by plaintiff's complaint are viable.

On the other hand, I do find that a staff physician has a protectible interest in the enforcement of a hospital's by-laws. Probably the interest is a contract interest and protectible as any contract right. Because part of plaintiff's claim relates to the alleged failure of the defendant to comply with the hospital by-laws, I am of the opinion that the complaint states a cause of

action and the demurrer should accordingly be overruled.

Very truly yours,
/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CBO:nt
Encls.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	NO. 74-307
v.	)	OPINION
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	

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Portland, Oregon 97205
Attorneys for Defendants

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	No. 74-308
v.	)	OPINION
ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D. TO AND INCLUDING FIFTIETH DOE, M.D., Defendants.	)	

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Attorney for Plaintiff

Robert P. Jones
Robert M. Keating
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Of Attorneys for Defendants

A. Allan Franzke
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Souther, Spaulding, Kinsey,
Williamson & Schwabe
1200 Standard Plaza
Portland, Oregon 97204
Attorneys for John C. English

Plaintiff, Kurt R. Straube, M.D., asserts that he was deprived of his Fourteenth Amendment rights by defendants, Emanuel Lutheran Charity Hospital Board and its president, Roger Larson.

Plaintiff, in a second Complaint, alleges that Larson and defendant-doctors, English, Seapy, and Helm, conspired to deprive him of equal protection under the law.

The defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(b)(1) and (b)(6).

Plaintiff, a radiologist, was a member of the staff of Emanuel Hospital. On February 22, 1973, Larson, the hospital president, temporarily suspended plaintiff's staff privileges. In January of

1974 Emanuel's executive board permanently suspended plaintiff from the staff. Plaintiff avers that his suspensions were neither preceded by a hearing nor justified. He contends that Larson and defendant-doctors conspired to effect his dismissal and destroy his professional reputation.

This is a civil rights action authorized under 42 U.S.C. §1983 and §1985. Jurisdiction is invoked pursuant to 28 U.S.C. §1343.

Plaintiff's initial hurdle is jurisdiction. He must show state involvement in the hospital's suspension of his staff privileges before federal law will apply. He contends that several factors establish "state action" by the defendants:

(1) Emanuel Hospital is impressed with a public responsibility.

(2) Emanuel receives substantial state and federal benefits, including funds under the Hill-Burton Act, 42 U.S.C. §200 et seq.

(3) Emanuel is permitted to issue tax-exempt bonds. He also asserts that Emanuel had a co-operation agreement with the City of Portland in Urban Renewal projects.

Emanuel is a private, non-profit hospital organized for charitable purposes. It is "only by sifting facts and weighing circumstances that the non-obvious involvement of the State can be attributed its true significance". Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

There is a split of authority as to whether the above factors clothe private hospitals with the requisite "state action". The cases cited by plaintiff fail to associate the claimed state involvement with the challenged activity. They fail to apply the nexus requirement set out by the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the controlling decision in the area of private versus state action.

Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. He contended that the grant of a liquor license by the state liquor authority implicated the state in actions by the club. The Court concluded that the regulatory scheme did not foster or encourage the club's racially discriminatory practices.

The Court limited the doctrine of state action by requiring a connection between the injury and the governmental presence.

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject "to State regulation in any degree whatsoever. Since State-furnished services

> include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions." Moose Lodge, 407 U.S. at 173.

Barret v. United States, _____ F. Supp. _____, S.D. N.Y. Docket No. 73 Civ. 1716 (1974), presents a thorough analysis of all the major cases cited by both sides. Barret involved facts similar to those alleged in plaintiff's Complaints. The Court applied the Moose Lodge requirement of a connection between governmental activity and a civil rights injury.

The Court also noted that the cases which subjected private institutions to the limitations of §1983 generally involved either racial discrimination or

activities which are traditionally the exclusive province of state or municipal governments. Barret rejected the notion that private hospitals carry on traditional government functions.

As noted in Moose Lodge, the Civil Rights Act is not intended to provide a general federal tort claims remedy. Plaintiff could conceivably find some degree of state involvement in virtually every major private institution existing today. Plaintiff's Complaints fail to allege the necessary nexus between governmental involvement with Emanuel Hospital and his suspension from staff privileges. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Plaintiff's second Complaint alleges a conspiracy in violation of 42 U.S.C. §1985. The Supreme Court in Griffin v. Breckinridge, 403 U.S. 88 (1971), held that before a cause of action exists under §1985 "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory

animus behind the conspirators' actions". Griffin at 102. Plaintiff has not alleged any class-based discrimination. His Complaint fails to satisfy the requirements of the statute. Jackson v. Norton Children's Hospital, 487 F.2d 502 (6th Cir. 1973); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).

Defendants' motions to dismiss are granted. A final order will be entered dismissing plaintiff's Complaints.

Dated this 7th day of October, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	CIVIL 74-307
v.	)	
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	JUDGMENT

KURT R. STRAUBE, M.D., Plaintiff,	)	CIVIL 74-308
v.	)	
ROGER G. LARSON, JOHN C. ENGLISH, et al., Defendants.	)	JUDGMENT

Based upon the Opinion of the Court entered contemporaneously herewith,

IT IS ORDERED and ADJUDGED that defendants' motions to dismiss are granted, that plaintiff shall take nothing, and the cases are dismissed on the merits.

DATED this 8th day of October, 1974.

/s/ Robert M. Christ
ROBERT M. CHRIST,
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KURT R. STRAUBE, M.D.,	)	
Appellant,	)	No. 74-3496
vs.	)	No. 74-3497
ROGER G. LARSON, et al.,	)	MEMORANDUM
Appellees.	)	

[March 18, 1976]

Appeal from the United States District Court
for the District of Oregon

Before: ELY and TRASK, Circuit Judges, and CHRISTENSEN, District Judge.*

---

*Honorable A. Sherman Christensen, Senior United States District Judge, Salt Lake City, Utah, sitting by designation.

Appendix D

Straube, a radiologist, was suspended from the staff of Emanuel Hospital, allegedly without a hearing or justification. The District Court dismissed his civil rights claims, brought under 42 U.S.C. § 1983, for lack of "state action". We affirm.

Emanuel Hospital is a private charitable institution receiving public funds and certain tax advantages. These facts alone are insufficient to establish the required state action. See Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975).

Straube contends that the hospital's connection with an urban renewal project of the City of Portland establishes the necessary state nexus. We disagree.

The key to a determination of state action is that the state must be significantly involved in the specific activity

of which complaint is made. Watkins, supra; Ascherman v. Presbyterian Hosp. of Pac. Med. Co., Inc., 507 F.2d 1103 (9th Cir. 1974); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974). Here there is no such allegation. That the hospital and the City are parties to an urban renewal project is an example of a state contact, but nothing indicates that Portland is involved in the hospital's decisions in respect to the hospital's personnel.

AFFIRMED.

Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1430

KURT R. STRAUBE, M.D.,

Petitioner,

v.

EMANUEL LUTHERAN CHARITY BOARD,
a corporation, dba EMANUEL HOSPITAL,

Respondent.

RESPONSE TO THE PETITION FOR A
WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT

See Inside Cover for Counsel

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Attorneys for Defendant-Respondent

TABLE OF CONTENTS

Page

Statement of the Case 1

Argument 1

1. The Supreme Court has twice declined review of the issue presented in this case. 1

2. A private non-profit hospital is not subject to the due process requirements of the Fourteenth Amendment to the United States Constitution. 2

3. Even if a private hospital is required to meet due process standards, such standards were met in this case. 5

Conclusion 8

Appendix A-1

Response to Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Straube v. Larson, et al, No. 75-1795

INDEX OF AUTHORITIES

Page

Cases Cited

Briscoe v. Bock, 540 F2d 392 (8th Cir 1976) 4

Doyle v. Unicare Health Serv. Inc. Aurora Center, 399 F Supp 69 (ND Ill 1975) 4

Greco v. Orange Memorial Hospital Corporation, 423 US 100, 96 S Ct 433, 46 L Ed 2d 376 (1975) 2, 8

Johnson v. Southwest Detroit Community Mental, Etc., 462 F Supp 166 (ED Mich 1978). 4

Large v. Reynolds, 414 F Supp 45 (WD Va 1976) 4

Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F Supp 1020 (SD NY 1971) 4

Poe v. Charlotte Memorial Hospital, Inc., 374 F Supp 1302 (WD NC 1974) . . 4

Schlein v. Milford Hospital, 571 F2d 427 (2nd Cir 1977) 4

Straube v. Larson, et al, 74-3496, 74-3497 (9th Cir 1976), petition for certiorari denied, 429 US 830, 97 S Ct 91, 50 L Ed 94 (1976) 1, 2, 8

Other

Page

U.S. Constitution, Amendment XIV . . . 2

Respondent Emanuel Lutheran Charity Board (Emanuel) respectfully urges the court to deny petitioner's request for writ of certiorari in this proceeding.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his complaint upon which the opinions below were based and the procedural history of this litigation.

ARGUMENT

1. The Supreme Court has twice declined review of the issue presented in this case.

Two Petitions for Certiorari dealing with the issue presented in this case have previously been denied by the Supreme Court. One of these, Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429 US 830, 97 S Ct 91, 50 L

Ed 94, 1976, was based on the same facts as this case. The other, which petitioner himself admitted dealt with the same issue as the present case, was Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2d 376 (1975). (Petition at 18) No significant developments have occurred since the court denied these petitions.

2. A private non-profit hospital is not subject to the due process requirements of the Fourteenth Amendment to the United States Constitution.

The issue of whether a private non-profit hospital is subject to due process requirements has already been fully briefed in the petition for writ of certiorari and the response to petition filed in the federal court case based on the same facts as this case. Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429

US 830, 97 S Ct 91, 50 L Ed 94, 1976. Respondent will rely primarily on the arguments made in response to the petition in that case which is attached as Appendix "A". See, also, the opinion of the District Court in that case attached to petition as Appendix "C".

An analysis of all cases cited in the earlier Petition for Certiorari revealed that only the Fourth Circuit was consistently holding that the acts of private hospitals are state actions requiring due process standards. In the other circuits a clear majority was emerging holding that private hospitals were not required to meet such standards. (Appendix A) The cases cited by petitioner in the current petition which are not included in the earlier petition reveal that the circuits have continued to resolve the issue against the peitioner. All the new cases cited by petitioner in support of their argument are federal district court cases. Two

out of three of these cases, Large v. Reynolds, 414 F Supp 45 (WD Va 1976) and Poe v. Charlotte Memorial Hospital, Inc., 374 F Supp 1302 (WD NC 1974) are cases in the Fourth Circuit.

Petitioner lists several new cases in which the courts have held that private hospital acts do not amount to state actions. Two of these cases, Briscoe v. Bock, 540 F2d 392 (8th Cir 1976) and Schlein v. Milford Hospital, 561 F2d 427 (2nd Cir 1977) are Court of Appeals cases. Three district court cases holding that private hospitals are not subject to due process requirements are also listed by the petitioner. Johnson v. Southwest Detroit Community Mental, Etc., 462 F Supp 166 (ED Mich 1978); Doyle v. Unicare Health Serv. Inc. Aurora Center, 399 F Supp 69 (ND Ill 1975); Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F Supp 1020 (SD NY 1971). Thus, an analysis of the cases cited in the petition itself show that since the court denied

certiorari in the former petition the circuits have continued to resolve this issue against finding private hospitals responsible for due process requirements. The previous split among the circuits on the issue appears to be resolving itself and there is no compelling need for this court to consider the question.

3. Even if a private hospital is required to meet due process standards, such standards were met in this case.

Since the Supreme Court of Oregon in this case decided that due process standards were not required, it did not reach the issue of whether the hospital procedures conformed to such standards. However, the court did deal with the issue of whether "common law due process" had been met by the hospital's procedures. The court answers each of plaintiff's contentions about lack of due process as follows:

"Plaintiff contends he was not permitted to show bias and prejudice of witnesses. In fact he was allowed the usual means, which is cross-examination. He contends he was not given a concise statement of the charges against him. He was given information of specific circumstances that occurred in connection with the making of particular hospital records from which records he could have determined all necessary information. He secured as much or more information about the charges than he would have received from the average criminal indictment. He made no request for the relevant hospital records but proceeded to hearing.

"Plaintiff contends he did not have an opportunity to call witnesses because defendant did not require the attendance of the witnesses he wished to examine. Defendant did not have subpoena power and, of course, could not require anyone's attendance. There is evidence that persons whom plaintiff requested to appear asked representatives of the defendant whether they had to appear and were told, truthfully, they did not have to; but there is no evidence that defendant discouraged or dissuaded anyone who was so inclined from appearing and testifying. In fact, some persons did appear and testify in plaintiff's behalf.

"Plaintiff complains that the committees before which the hearings were held were not impartial and

that they considered information outside of the record. * * * However, we agree with the trial judge that plaintiff did not carry the burden of proving that the members pre-judged the charges against him or that the proceeding was basically unfair.

"Plaintiff charges that the bylaws and regulations of summary suspension were vague and overbroad and were not followed. * * * It is our conclusion that the bylaws were substantially complied with and that the standard, 'in the best interests of patient care,' is as definite as was practical. * * *"

"Plaintiff contends that he was given no opportunity by the bylaws or in fact to be heard in advance of the summary suspension order. It is true the bylaws do not provide for any such hearing nor was he given one. Assuming that plaintiff is entitled to 'fair procedure' under a common law theory, we cannot say that he is entitled to a pre-suspension hearing when the best interest of the patients may indicate to the contrary." (Petition A-7 to A-9).

Thus, the Oregon Supreme Court essentially held that if plaintiff had any procedural rights they were adequately met by the

hearings he was afforded by the hospital.

CONCLUSION

The Supreme Court has twice denied certiorari in cases involving the identical issue presented by the present case. Greco v. Orange Memorial Hospital Corporation, 423 US 1000, 96 S Ct 433, 46 L Ed 2nd 376 (1975). Straube v. Larson, et al, 74-3496, 74-3497, (9th Cir 1976), petition for certiorari denied, 429 US 830, 97 S Ct 91, 50 L Ed 94, 1976. One of the cases in which the court denied certiorari was based on the same fact situation as that presented by the instant case. The law cited by the petitioners establishes that all circuits except the Fourth Circuit have continued to hold that a private hospital is not responsible for meeting due process standards.

In addition, the conclusion of the Oregon Supreme Court that procedural

requirements were met in this case, illustrates that even if the hospitals were required to meet due process standards, such standards were met under the facts of the case. No compelling need exists for the court to consider the question presented in this case.

Respectfully submitted,

LANG, KLEIN, WOLF, SMITH,
GRIFFITH & HALLMARK

William L. Hallmark

APPENDIX A

Response to Petition for Certiorari filed in answer to previous petition on same facts in Kurt R. Straube, M.D. v. Roger G. Larson and Emanuel Lutheran Charity Board, a corporation, dba Emanuel Hospital, No. 75-1795.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1795

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

See Inside Cover for Counsel

Appendix A

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Lutheran Charity Board,
dba Emanuel Hospital,
Robert Seapy, M.D., and
Richard K. Helm, M.D.

July 1, 1976

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	3
CONCLUSION	7

AUTHORITIES CITED

CASES	Page
Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir., 1974)	5
Barrett v. United Hospital, 376 F.Supp 791 (S.D.N.Y., 1974), aff'd, 506 F.2d 1395 (2nd Cir., 1975)	5
Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir., 1973)	5
Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir., 1971)	6
Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975)	5
Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th Cir., 1973)	6
Klinge v. Lutheran Charities Ass'n., 523 F.2d 56 (8th Cir., 1975)	5
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	3, 5, 7
Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir., 1973)	5, 6

STATUTES AND CONSTITUTION

42 U.S.C. § 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Roger G. Larson, Emanuel Lutheran Charity Board, Robert Seapy, M.D., and Richard K. Helm, M.D., respectfully urge the Court to deny Petitioner's request for a Writ of Certiorari in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is attached to the Petition as Exhibit A. The opinion of the District Court is not reported but is attached to the Petition as Exhibit B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether the existence of governmental contacts with a private institution renders conduct of that institution which is unrelated to the governmental contacts state action subject to Constitutional regulation.

STATUTE INVOLVED

42 U.S.C. § 1983 is set forth in the

Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his Complaint upon which the opinions below were based and the procedural history of this litigation.

REASONS FOR DENYING THE WRIT

The question presented in this case was resolved by this Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which stated that where governmental contacts with a private institution were not so pervasive as to make that institution lose its essentially private character, there must be a nexus between the governmental contacts alleged and the conduct complained of before that conduct can fairly be characterized as state action. Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. Plaintiff relied on the liquor licensing provisions of Pennsylvania law. This Court held that the practice of racial

discrimination was not state action, even though the club was subject to extensive government regulation by virtue of its liquor license. "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176 - 177.

Numerous attempts have been made to label any action of a purely private hospital state action by virtue of the fact that the hospital receives Federal funds under the Hill-Burton Act and has other incidental governmental contact. The United States Courts of Appeals for the Second, Fifth, Seventh, Ninth and Tenth Circuits have each held that the actions of a private, non-profit hospital do not constitute state action merely by reason of the hospital's receipt of Hill-Burton funds, tax advantages or other incidental governmental

contacts absent some connection between the governmental contacts and the action complained of. Barrett v. United Hospital, 376 F.Supp 791 (S.D.N.Y., 1974), aff'd, 506 F.2d 1395 (2nd Cir., 1975), Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975), Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir., 1973), Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir., 1974), Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

The Eighth Circuit in Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir., 1975), did not decide this question since the Defendant Hospital conceded Plaintiff's position and the Court never had to address it.

The Sixth Circuit's early decisions did ignore the nexus requirement, but, subsequent to this Court's decision in Moose Lodge, that Circuit reversed its position and held that the receipt of Hill-Burton funds alone did not make

conduct of a private hospital state action. Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th Cir., 1973).

Plaintiff, in his Petition, asserts that there is a split within the Tenth Circuit because of the early decision of Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir., 1971). In that case, the hospital did not challenge Plaintiff physician's assertion that its conduct amounted to state action. In Ward v. St. Anthony Hospital, supra, the Court restated its long-standing rule that "the claimed involvement must be associated with the challenged activity" and held that since there existed no nexus between the governmental contacts alleged and the medical staff decisions of St. Anthony Hospital, such decisions were not state action. 476 F.2d at 675.

Thus, only the Fourth Circuit has consistently ruled that receipt of Hill-Burton funds alone transforms the conduct of a private hospital into that of a state agency.

CONCLUSION

A clear majority is emerging among the Circuits applying the nexus requirement outlined by this Court in the Moose Lodge decision with regard to the conduct of private hospitals receiving government funds. The split among the Circuits appears to be resolving itself and there is no compelling need for this Court to consider the question.

Respectfully submitted,

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I hereby certify that I served the foregoing Response to the Petition for a Writ of Certiorari to the United States Supreme Court on the following:

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attorneys for Plaintiff-Petitioner on the ____ day of March, 1980, by mailing to them a true and correct copy thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes, addressed to said attorneys at their regular office address, or their address as last given by them on a document which they have filed in the above-entitled cause and served on me; said sealed envelopes were then deposited in the United States post office at Portland, Oregon, on the day last above mentioned, with the postage thereon fully paid.

William L. Hallmark